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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

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Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
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Constitutional Law
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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

1. In General

§ 77. Construction of constitutional provisions, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 583, 585 to 589, 596, 1067

Although a clear constitutional provision is binding on the courts, an ambiguous provision must be construed by applying the language as interpreted to both the subject matter and the attendant circumstances.

"Construction," as applied to a written constitution, is a broad term.[1] Strictly, the term signifies determining the meaning and proper effect of language by considering the language along with the subject matter and attendant circumstances,[2] which means applying the language as interpreted to both the subject matter and the attendant circumstances.[3] Thus, to understand the meaning of one part of a state constitution, the court must read it in the light of other provisions relating to the same subject matter.[4]

Clear constitutional provisions are binding[5] on both the legislators and the courts.[6] Constitutional provisions are not open to construction as a matter of course,[7] and it is appropriate only when necessary to clarify the meaning of the provision.[8] When amending a constitution, the legislature and the voters expect the courts to be familiar with settled rules of constitutional construction and to follow them.[9]

Footnotes

1 Mo.—First Nat. Bank of St. Joseph v. Buchanan County, 356 Mo. 1204, 205 S.W.2d 726 (1947).

2 Mo.—Dorrance v. Dorrance, 242 Mo. 625, 148 S.W. 94 (1912).

3 Ariz.—Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Gynecologists, 227 Ariz. 262, 257 P.3d 181 (Ct. App. Div. 1 2011).
Mo.—Dorrance v. Dorrance, 242 Mo. 625, 148 S.W. 94 (1912).

4 Ark.—Kelly v. Martin ex rel. State, 2014 Ark. 217, 433 S.W.3d 896 (2014).

5 Ind.—Meredith v. Pence, 984 N.E.2d 1213, 290 Ed. Law Rep. 998 (Ind. 2013).

6 Mich.—Dearborn Tp. v. Dail, 334 Mich. 673, 55 N.W.2d 201 (1952).
R.I.—Gorham v. Robinson, 57 R.I. 1, 186 A. 832 (1936).

7 Neb.—State ex rel. Stenberg v. Omaha Exposition and Racing, Inc., 263 Neb. 991, 644 N.W.2d 563 (2002).

8 Ind.—Meredith v. Pence, 984 N.E.2d 1213, 290 Ed. Law Rep. 998 (Ind. 2013).
Neb.—State ex rel. Stenberg v. Omaha Exposition and Racing, Inc., 263 Neb. 991, 644 N.W.2d 563 (2002).

9 Okla.—Calvey v. Daxon, 2000 OK 17, 997 P.2d 164 (Okla. 2000).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

1. In General

§ 78. Authority to construe constitutional provisions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 583, 585 to 589, 596, 1067

Generally, the construction of constitutions is the peculiar province of the courts, and to them belongs the final decision, and courts of the United States have final authority in all cases involving construction of the Federal Constitution.

Due to the circumstances and conditions necessarily arising in administering the affairs of government, those who are charged with official duties—whether executive, legislative, or judicial—must necessarily construe the constitutions in some instances.[1] Accordingly, in performing its assigned constitutional duties, each branch of government must initially interpret the constitution, and the interpretation of its powers by any branch is due great respect from the other branches.[2] However, generally, the construction of a constitution is the peculiar province of the courts, which have the final decision.[3] Furthermore, a constitutional interpretation by a court of last resort binds all departments of the government, including the legislature.[4] The federal courts have final authority in all cases that involve a construction of the federal Constitution.[5]

Footnotes

1 U.S.—Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803).
Okla.—State ex rel. Tharel v. Board of Com'rs of Creek County, 1940 OK 468, 188 Okla. 184, 107 P.2d 542 (1940).
Civil rights amendments
U.S.—Constructors Ass'n of Western Pennsylvania v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977), judgment aff'd, 573 F.2d 811 (3d Cir. 1978).

2 U.S.—U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); U.S. v. Johnson, 577 F.2d 1304 (5th Cir. 1978).

3 Kan.—State v. Nelson, 210 Kan. 439, 502 P.2d 841 (1972).
Ky.—Grantz v. Grauman, 302 S.W.2d 364 (Ky. 1957).
Independent judgment
The Supreme Court of Alaska interprets the Alaska Constitution using its independent judgment, adopting the rule of law that is most persuasive in light of precedent, reason, and policy.
Alaska—Grinols v. State, 74 P.3d 889 (Alaska 2003).
A.L.R. Library
Validity, Construction, and Application of State Constitutional and Statutory Provisions Regarding Corporate Farming, 125 A.L.R.5th 147.
Construction and Operation of Twenty-Seventh Amendment to United States Constitution Relating to Congressional Compensation, 95 A.L.R.5th 459.
Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights, 91 A.L.R.5th 343.
Validity, construction, and effect of state constitutional or statutory provision regarding nepotism in the public service, 11 A.L.R.4th 826 (secs. 3-6 superseded in part Federal and State Constitutional Provisions and State Statutes as Prohibiting Employment Discrimination Based on Heterosexual Conduct or Relationship, 123 A.L.R.5th 411).

4 Kan.—State ex rel. Schneider v. Kennedy, 225 Kan. 13, 587 P.2d 844 (1978).

5 U.S.—Barron v. City of Baltimore, 32 U.S. 243, 8 L. Ed. 672, 1833 WL 4189 (1833).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

1. In General

§ 79. Rules of construction, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 583, 585 to 589, 596, 1067

Although a constitution should be construed in such a manner as to meet new or changed conditions as they arise, it should be construed as fundamental law and should be interpreted in such a manner as to carry out the broad general principles stated therein.

In construing a constitution, its essential character must always be kept in mind,[1] and a constitution should be construed with reference to, and in the light of, the fundamental principles underlying all constitutions.[2] It is to be regarded as fundamental law to which all other laws must yield[3] and should be interpreted in a manner that carries furthers the broad general principles stated in it.[4] Although the meaning of a constitution remain fixed and unchanged from the time of its adoption,[5] as does its principles,[6] a constitution must be construed as if intended to stand for a great length of time.[7] Thus, a constitution is a living document[8] that is progressive and not static.[9] Accordingly, a court's goal in interpreting a provision of a constitution is to understand the wording in light of the way the wording would have been understood and used by those who created the provision[10] and to faithfully apply the principles embodied in the constitution to modern circumstances that arise.[11]

Constitutional provisions must be construed in context,[12] which means that a provision's history and purpose must be considered in determining its meaning.[13]

The meaning given to a constitutional provision should be applied to meet new or changed conditions as they arise,[14] without departing from the constitution's basic principles.[15]

Uniform construction.

The construction given a constitution must be uniform so that the operation of the instrument will be inflexible, operating at all times alike, and in the same manner with respect to the same subjects.[16] This is true even though changed circumstances may make a different rule seem desirable[17] since the will of the people as expressed in the organic law is subject to change only in the manner prescribed by them.[18] Amendments are to be construed in conformity with the design of the original constitution[19] and in the same spirit and according to the same rules.[20]

Initiative and referendum.

A provision relating to an initiative or referendum should be liberally construed.[21] Any doubt should be resolved in favor of the exercise of this right by the people.[22]

Footnotes

1 Mont.—General Agriculture Corp. v. Moore, 166 Mont. 510, 534 P.2d 859 (1975).
N.J.—Behnke v. New Jersey Highway Authority, 13 N.J. 14, 97 A.2d 647 (1953).

2 Cal.—Committee To Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 172 Cal. Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118 (1981).
Okla.—Draper v. State, 1980 OK 117, 621 P.2d 1142 (Okla. 1980).
Checks and balances
A constitution must be interpreted in light of the fundamental principle of checks and balances.
D.C.—Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979).

3 Okla.—Draper v. State, 1980 OK 117, 621 P.2d 1142 (Okla. 1980).

4 Mass.—Opinion of Justices to Senate, 386 Mass. 1201, 436 N.E.2d 935, 4 Ed. Law Rep. 1236 (1982).

5 Miss.—State v. Hall, 187 So. 2d 861 (Miss. 1966).
Mo.—State, on inf. of Dalton v. Dearing, 364 Mo. 475, 263 S.W.2d 381 (1954).
Wash.—State ex rel. Evans v. Brotherhood of Friends, 41 Wash. 2d 133, 247 P.2d 787 (1952).

6 Mo.—State, on inf. of Dalton v. Dearing, 364 Mo. 475, 263 S.W.2d 381 (1954).
Nev.—Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967).
Wash.—State ex rel. Evans v. Brotherhood of Friends, 41 Wash. 2d 133, 247 P.2d 787 (1952).

7 Iowa—Bechtel v. City of Des Moines, 225 N.W.2d 326 (Iowa 1975).
Wash.—Seattle School Dist. No. 1 of King County v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978).

8 Fla.—Coastal Florida Police Benev. Ass'n, Inc. v. Williams, 838 So. 2d 543 (Fla. 2003).
Organic document
N.C.—Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980), aff'd in part, rev'd in part on other grounds, 302 N.C. 357, 275 S.E.2d 439 (1981).

9 N.M.—Humana of New Mexico, Inc. v. Board of County Com'rs of Lea County, 1978-NMSC-036, 92 N.M. 34, 582 P.2d 806 (1978).
Recognition of societal change

A constitution is vital enough to take cognizance of changes, the evolution of prejudices, and the appearance and disappearance of distinct and significant classes, and the constitution extends its protection as the need arises.

U.S.—Brooks v. Beto, 366 F.2d 1, 4 A.L.R. Fed. 403 (5th Cir. 1966).

10 Or.—State v. Rogers, 330 Or. 282, 4 P.3d 1261 (2000).

11 Or.—Yancy v. Shatzer, 337 Or. 345, 97 P.3d 1161 (2004).

12 U.S.—U.S. v. Balsys, 524 U.S. 666, 118 S. Ct. 2218, 141 L. Ed. 2d 575, 49 Fed. R. Evid. Serv. 371 (1998).

Ind.—Hoagland v. Franklin Township Community School Corp., 27 N.E.3d 737 (Ind. 2015).

Utah—Laney v. Fairview City, 2002 UT 79, 57 P.3d 1007 (Utah 2002) (holding modified on other grounds by, Moss v. Pete Suazo Utah Athletic Com'n, 2007 UT 99, 175 P.3d 1042 (Utah 2007)).

Absolute words

Even when constitutional language is expressed in absolute terms, the words derive their meaning from their context, which must be assessed when determining whether the constitution has been contravened.

U.S.—Peterson v. Williams, 85 F.3d 39 (2d Cir. 1996).

13 Ind.—Hoagland v. Franklin Township Community School Corp., 27 N.E.3d 737 (Ind. 2015).

N.M.—State v. Boyse, 2013-NMSC-024, 303 P.3d 830 (N.M. 2013).

Utah—Laney v. Fairview City, 2002 UT 79, 57 P.3d 1007 (Utah 2002) (holding modified on other grounds by, Moss v. Pete Suazo Utah Athletic Com'n, 2007 UT 99, 175 P.3d 1042 (Utah 2007)).

14 U.S.—U.S. v. Classic, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941).

15 Nev.—Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967).

16 U.S.—Gallagher v. Evans, 536 F.2d 899 (10th Cir. 1976).

Wash.—State ex rel. Munro v. Todd, 69 Wash. 2d 209, 417 P.2d 955 (1966), opinion amended on other grounds, 426 P.2d 978 (Wash. 1967).

17 N.C.—State v. Emery, 224 N.C. 581, 31 S.E.2d 858, 157 A.L.R. 441 (1944).

Tex.—Kaufman County Levee Imp. Dist. No. 10 v. National Life Ins. Co., 171 S.W.2d 188 (Tex. Civ. App. Dallas 1943), writ refused.

Wash.—State ex rel. Lemon v. Langlie, 45 Wash. 2d 82, 273 P.2d 464 (1954).

18 N.C.—State v. Emery, 224 N.C. 581, 31 S.E.2d 858, 157 A.L.R. 441 (1944).

Tex.—Kaufman County Levee Imp. Dist. No. 10 v. National Life Ins. Co., 171 S.W.2d 188 (Tex. Civ. App. Dallas 1943), writ refused.

19 Mass.—In re Opinion of the Justices, 234 Mass. 597, 127 N.E. 525 (1920).

20 Mass.—Trefry v. Putnam, 227 Mass. 522, 116 N.E. 904 (1917).

R.I.—In re Opinion to the Governor, 44 R.I. 275, 117 A. 97 (1922).

21 Colo.—In re Second Initiated Constitutional Amendment Respecting Rights of Public to Uninterrupted Service by Public Emp. of 1980, 200 Colo. 141, 613 P.2d 867 (1980).

22 Cal.—McFadden v. Jordan, 32 Cal. 2d 330, 196 P.2d 787 (1948).

Idaho—Higer v. Hansen, 67 Idaho 45, 170 P.2d 411 (1946).

Okla.—In re Initiative Petition No. 224, State Question No. 314, 1946 OK 215, 197 Okla. 432, 172 P.2d 324 (1946).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

1. In General

§ 80. Liberal construction of constitutional provision

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 583, 585 to 589, 596, 1067

As a general rule, a constitutional provision should be broadly and liberally construed.

As a general rule, a constitutional provision should be broadly and liberally construed[1] and thus should not receive too narrow or literal an interpretation.[2] Exceptions to general constitution provisions must be narrowly and strictly construed.[3] The principle of liberal construction does not, however, license either enlargement or restriction of the constitution's evident meaning.[4]

Footnotes

1 Cal.—Richmond v. Shasta Community Services Dist., 32 Cal. 4th 409, 9 Cal. Rptr. 3d 121, 83 P.3d 518 (2004).
Mont.—Willems v. State, 2014 MT 82, 374 Mont. 343, 325 P.3d 1204 (2014).
Amendment

Constitutional amendments are adopted for the purpose of making a change in the existing system, and a court is under the duty to consider the old law, the mischief, and the remedy and interpret the constitution broadly to accomplish the manifest purpose of the amendment.

S.D.—Doe v. Nelson, 2004 SD 62, 680 N.W.2d 302 (S.D. 2004).

2 Neb.—Nebraska Public Power Dist. v. Hershey School Dist., 207 Neb. 412, 299 N.W.2d 514 (1980).

Wash.—State ex rel. Anderson v. Chapman, 86 Wash. 2d 189, 543 P.2d 229 (1975).

Liberal or broad construction in ascertaining intent of constitution, see § 83.

3 Mass.—Com. v. Yee, 361 Mass. 533, 281 N.E.2d 248 (1972).

Prohibitions

Any exception to general constitutional prohibition must be narrowly and strictly construed.

Del.—Opinion of the Justices, 385 A.2d 695 (Del. 1978).

4 Cal.—Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles, 24 Cal. 4th 830, 102 Cal. Rptr. 2d 719, 14 P.3d 930 (2001).

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16 C.J.S. Constitutional Law § 81

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

1. In General

§ 81. Implied constitutional provisions

Topic Summary | References | Correlation Table

West's Key Number Digest

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Implied provisions are as much a part of the constitution as express provisions although it is presumed that the people expressed themselves in careful and measured terms in framing the constitution and that they left as little as possible to implication.

Implied provisions are as much a part of the constitution as express provisions[1] although it is presumed that the people expressed themselves in careful and measured terms in framing the constitution and that they left as little as possible to implication.[2] Radical changes in the existing order of conditions will not be left to uncertain implication.[3]

Footnotes

1 U.S.—Dillon v. Gloss, 256 U.S. 368, 41 S. Ct. 510, 65 L. Ed. 994 (1921).
Fla.—The Florida Bar v. Lewis, 358 So. 2d 897 (Fla. 1st DCA 1978), judgment aff'd, 372 So. 2d 1121 (Fla. 1979).

N.C.—In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).
W. Va.—State ex rel. Moore v. Blankenship, 158 W. Va. 939, 217 S.E.2d 232 (1975).
Implicit indicators of intent, see § 83.

2 Ky.—City of Louisville v. German, 286 Ky. 477, 150 S.W.2d 931 (1940).
Mich.—De Maggio v. Attorney General, 300 Mich. 251, 1 N.W.2d 530 (1942).
N.M.—Flaska v. State, 1946-NMSC-035, 51 N.M. 13, 177 P.2d 174 (1946).

Extensions by implication not favored

N.Y.—Fitzgerald v. Cohen, 175 Misc. 148, 22 N.Y.S.2d 863 (Sup 1940), order aff'd, 260 A.D. 804, 22 N.Y.S.2d 527 (2d Dep't 1940).

3 Ga.—Griffin v. Vandegriff, 205 Ga. 288, 53 S.E.2d 345 (1949).
Ky.—Commonwealth ex rel. Attorney General v. Howard, 297 Ky. 488, 180 S.W.2d 415 (1944).

Light implications

An intention to restrict legislative action by constitutional provision cannot lightly be implied when not shown by language used in the constitution or its amendments.
Mass.—Opinion of the Justices, 308 Mass. 601, 32 N.E.2d 298 (1941).

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16 C.J.S. Constitutional Law § 82

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

1. In General

§ 82. Rules of statutory construction as applied to constitutions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 583, 585 to 589, 596, 1067

Generally, principles of construction applicable to statutes also apply to constitutions but not to the extent of defeating the purposes for which a constitution is drawn.

Issues concerning the proper construction of a constitution are in the main governed by the same general principles that control in ascertaining the meaning of all written instruments.[1] More specifically, as a general rule, the usual principles governing the construction of statutes apply also to the construction of constitutions.[2] Importantly, however, consideration should be given to the broader purposes and scope of constitutions,[3] and a reliance on interpretive rules derived from statutory construction concepts is tempered by robust countervailing limitations that are peculiar to the constitutional arena.[4] Constitutions demand greater flexibility in interpretation than that required by legislatively enacted statutes as constitutions are living documents, not easily amended, and consequently, courts are far less circumscribed in construing language in the area of constitutional interpretation than in the realm of statutory construction.[5] Thus, constitutional provisions should receive a broader and more liberal construction than statutes.[6] As with statutes, the construction of constitutional provisions is not to be a hypertechnical process.[7]

Footnotes

1 La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).
N.C.—State v. Webb, 358 N.C. 92, 591 S.E.2d 505 (2004).

2 Cal.—Morgan v. Imperial Irrigation District, 223 Cal. App. 4th 892, 167 Cal. Rptr. 3d 687 (4th Dist. 2014), review denied, (May 14, 2014).
Colo.—People v. Fioco, 2014 COA 22, 342 P.3d 530 (Colo. App. 2014), cert. denied, 2015 WL 339312 (Colo. 2015).
Fla.—In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Medical Conditions, 132 So. 3d 786 (Fla. 2014).
Ill.—Kanerva v. Weems, 2014 IL 115811, 383 Ill. Dec. 107, 13 N.E.3d 1228 (Ill. 2014).
Neb.—Conroy v. Keith County Board of Equalization, 288 Neb. 196, 846 N.W.2d 634 (2014).
S.C.—State v. Long, 406 S.C. 511, 753 S.E.2d 425 (2014).
Inapplicable to constitutional amendments or repeals
A rule of statutory construction—to the effect that amendments and repeals that amount to reenactment of a statute in substantially the same language as contained in the original enactment merely results in continuation of the original statute—does not apply when the amendment or repeal is by way of constitutional amendment or addition.
N.M.—Morris v. Gonzales, 1978-NMSC-026, 91 N.M. 495, 576 P.2d 755 (1978).

3 Ind.—State v. Nixon, 270 Ind. 192, 384 N.E.2d 152 (1979).
Mo.—State, at Information of Martin v. City of Independence, 518 S.W.2d 63 (Mo. 1974).

4 Pa.—In re Bruno, 101 A.3d 635 (Pa. 2014).

5 Fla.—Coastal Florida Police Benev. Ass'n, Inc. v. Williams, 838 So. 2d 543 (Fla. 2003).

6 Ind.—State v. Nixon, 270 Ind. 192, 384 N.E.2d 152 (1979).
Mo.—State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. 1973).
Neb.—Hall v. Progress Pig, Inc., 259 Neb. 407, 610 N.W.2d 420 (2000).
Reason for rule
Construction is broader than that given to statutes since powers and restraints dealt with in constitutions are unlimited.
Ind.—State v. Nixon, 270 Ind. 192, 384 N.E.2d 152 (1979).

7 Mo.—Pearson v. Koster, 367 S.W.3d 36 (Mo. 2012).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

2. Intent and Purpose

§ 83. Court's intent and purpose in construing a constitutional provision

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 584, 585 to 588, 589

In construing a constitutional provision, the function of the court is to ascertain and give effect to the intent and purpose of the framers and the people who adopted it.

When interpreting a constitutional provision, a court examines its purpose and intent,[1] and constitutional provisions should be construed in consonance with the objects and purposes that were in contemplation at the time of their adoption.[2] Constitutional rights are enshrined with the scope they were understood to have when the people adopted them whether or not future legislatures or future judges think that scope too broad.[3] Constitutions must be construed to promote the objects for which they were framed and adopted,[4] and the court must interpret the various provisions of a constitution to carry out the spirit of that instrument.[5]

The intent of the framers and adopters is controlling when construing a constitution,[6] and the aim of constitutional interpretation is to determine and effectuate the intent of those who enacted the constitutional provision at issue.[7] Accordingly, the fundamental principle in constitutional construction is that effect must be given to the intent of the framers[8] and of the people who ratified and adopted it.[9] Furthermore, courts are obligated to construe constitutional amendments in a manner that effectuates the voters'

purpose in adopting the law.[10] If history suggests that there was more than one purpose behind a constitutional provision, the provision should be interpreted to satisfy each purpose.[11]

Statements of purpose.

Like statutes, constitutional provisions may include broadly worded statements of purpose.[12] As with a statute's statement of purpose, a constitutional section's statement of purpose does not provide for an independent, enforceable claim as it is not in itself substantive; such a statement of purpose is instead a guide to intent and implementation.[13]

Amendments.

Constitutional amendments are construed to effectuate their purpose.[14] Courts should not engage in a narrow or technical construction of an initiated constitutional amendment if doing so would contravene the intent of the electorate.[15]

Footnotes

1 N.H.—Baines v. New Hampshire Senate President, 152 N.H. 124, 876 A.2d 768 (2005).
Utah—State v. Hernandez, 2011 UT 70, 268 P.3d 822 (Utah 2011).

2 N.C.—State v. Webb, 358 N.C. 92, 591 S.E.2d 505 (2004).

3 U.S.—District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

4 Ark.—Martin v. Kohls, 2014 Ark. 427, 444 S.W.3d 844 (2014).
Wis.—State v. Cole, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 (2003).

5 N.M.—State v. Trujillo, 2002-NMSC-005, 131 N.M. 709, 42 P.3d 814 (2002).

6 Fla.—Coastal Florida Police Benev. Ass'n, Inc. v. Williams, 838 So. 2d 543 (Fla. 2003).
N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).
N.D.—Haugland v. City of Bismarck, 2012 ND 123, 818 N.W.2d 660 (N.D. 2012).
Ohio—State v. Jackson, 102 Ohio St. 3d 380, 2004-Ohio-3206, 811 N.E.2d 68 (2004).
Voting population
The understanding that can reasonably be ascribed to the voting population as a whole controls the interpretation of a constitutional provision.
La.—East Baton Rouge Parish School Bd. v. Foster, 851 So. 2d 985, 180 Ed. Law Rep. 356 (La. 2003).

7 Cal.—Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority, 44 Cal. 4th 431, 79 Cal. Rptr. 3d 312, 187 P.3d 37 (2008).
Furthering goals of framers
The solution to problems of constitutional interpretation must be found in a study of the specific provision of the constitution and the best method under current conditions to further advance the goals of the framers in adopting it.
W. Va.—State ex rel. McGraw v. Burton, 212 W. Va. 23, 569 S.E.2d 99 (2002).

8 Alaska—Duncan v. Retired Public Employees of Alaska, Inc., 71 P.3d 882 (Alaska 2003).
Haw.—Hanabusa v. Lingle, 105 Haw. 28, 93 P.3d 670 (2004).
Kan.—In re Cent. Illinois Public Services Co., 276 Kan. 612, 78 P.3d 419 (2003).
N.C.—State v. Webb, 358 N.C. 92, 591 S.E.2d 505 (2004).
Or.—State v. Cavan, 337 Or. 433, 98 P.3d 381 (2004).
S.D.—Doe v. Nelson, 2004 SD 62, 680 N.W.2d 302 (S.D. 2004).
W. Va.—State ex rel. K.M. v. West Virginia Dept. of Health and Human Resources, 212 W. Va. 783, 575 S.E.2d 393 (2002).
Wyo.—Director of Office of State Lands & Investments v. Merbanco, Inc., 2003 WY 73, 70 P.3d 241, 177 Ed. Law Rep. 558 (Wyo. 2003).

9 Alaska—Duncan v. Retired Public Employees of Alaska, Inc., 71 P.3d 882 (Alaska 2003).
Haw.—Hanabusa v. Lingle, 105 Haw. 28, 93 P.3d 670 (2004).
Kan.—In re Cent. Illinois Public Services Co., 276 Kan. 612, 78 P.3d 419 (2003).
Mich.—County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004).
S.D.—Doe v. Nelson, 2004 SD 62, 680 N.W.2d 302 (S.D. 2004).
Tenn.—Cleveland Surgery Center, L.P. v. Bradley County Memorial Hosp., 30 S.W.3d 278 (Tenn. 2000).
W. Va.—State ex rel. K.M. v. West Virginia Dept. of Health and Human Resources, 212 W. Va. 783, 575 S.E.2d 393 (2002).

Will of the people

The court's duty in interpreting a constitutional amendment is to give effect to the will of people.
Colo.—Washington County Bd. of Equalization v. Petron Development Co., 109 P.3d 146 (Colo. 2005).

Common understanding

A court's review of state constitutional claims requires a search for the common understanding of both those who framed the constitution and those who ratified it.
Ind.—Embry v. O'Bannon, 798 N.E.2d 157, 182 Ed. Law Rep. 325 (Ind. 2003) (holding modified on other grounds by, Meredith v. Pence, 984 N.E.2d 1213, 290 Ed. Law Rep. 998 (Ind. 2013)).

10 Cal.—Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority, 44 Cal. 4th 431, 79 Cal. Rptr. 3d 312, 187 P.3d 37 (2008).
Colo.—Colorado Ethics Watch v. Senate Majority Fund, LLC, 2012 CO 12, 269 P.3d 1248 (Colo. 2012).

11 Wash.—Washington Water Jet Workers Ass'n v. Yarbrough, 151 Wash. 2d 470, 90 P.3d 42 (2004), as amended, (May 27, 2004).

12 Wis.—Schilling v. State Crime Victims Rights Bd., 2005 WI 17, 278 Wis. 2d 216, 692 N.W.2d 623 (2005).

13 Wis.—Schilling v. State Crime Victims Rights Bd., 2005 WI 17, 278 Wis. 2d 216, 692 N.W.2d 623 (2005).

14 Okla.—Calvey v. Daxon, 2000 OK 17, 997 P.2d 164 (Okla. 2000).

15 Colo.—Davidson v. Sandstrom, 83 P.3d 648 (Colo. 2004).

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§ 84. Unclear or ambiguous provisions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 584, 585 to 588, 589

If a constitutional provision's language is ambiguous or does not address the exact issue, a court must endeavor to construe the constitutional provision in a manner consistent with the intent of the framers and the voters.

When the plain language of a constitutional provision is susceptible to two plausible readings, it is ambiguous, and therefore, the court may go beyond the text by looking to evidence of legislative history and relevant policy considerations, in determining the meaning of the provision.[1] When constitutional language is subject to more than one reasonable interpretation, it is necessary to determine the intent of the provision.[2] If a constitutional provision's language is ambiguous or does not address the exact issue, a court must endeavor to construe the constitutional provision in a manner consistent with the intent of the framers[3] and the voters.[4] However, a court may not add words to a constitutional provision by implication when the plain language is clear and unambiguous.[5]

Wherever reasonably possible, courts seek to resolve ambiguity in a constitutional provision in a way that advances the apparent purpose for which the provision was adopted.[6] When construing an ambiguous constitutional provision, a court should ascertain

and give effect to the intent of both the framers of the provision and of the people who adopted it although the intent of the voting population will govern in the case of an apparent conflict.[7]

Footnotes

1 Utah—State v. Willis, 2004 UT 93, 100 P.3d 1218 (Utah 2004).
Extrinsic aids to construing constitutions, see §§ 103 to 113.

2 La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).

3 Fla.—Wilson v. Fallin, 2011 OK 76, 262 P.3d 741 (Okla. 2011).

4 Fla.—West Florida Regional Medical Center, Inc. v. See, 79 So. 3d 1 (Fla. 2012).

5 Mo.—Wright-Jones v. Nasheed, 368 S.W.3d 157 (Mo. 2012).

6 Minn.—State v. Lessley, 779 N.W.2d 825 (Minn. 2010).

7 La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

2. Intent and Purpose

§ 85. Sources for determining intent

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 584 to 589

Generally, the intent of the framers of a constitution is to be found in the instrument itself although courts examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of the constitution, and case law interpreting the specific provisions.

In interpreting an original constitutional provision, the court considers the text of the provision, its history, and cases interpreting it.[1] When interpreting constitutional provisions and amendments, a court looks to intrinsic as well as extrinsic sources.[2] More specifically, the intent of the framers of a constitution is to be found in the instrument itself,[3] at least in the absence of ambiguity calling for permissible extrinsic aids.[4] The intent of the framers should be determined from the plain meaning of the words used,[5] and if that is possible, no other means of interpretation are proper.[6] Accordingly, effect should be given to the purpose that is indicated by a fair interpretation of the constitution's language.[7] A construction that effectuates the plain intent or purpose of a constitutional provision is favored and should be adopted.[8] A constitution does not derive its force from the convention that framed it but from the people who ratified it.[9] Thus, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed but rather that they have accepted them in the

sense most obvious to the common understanding and ratified the instrument in the belief that was the sense designed to be conveyed.[10] Furthermore, the public understanding of a legal text in the period after its enactment or ratification is a critical tool of constitutional interpretation.[11]

Although the text of a constitution must always be the primary guide to the purpose of a constitutional provision, a court should approach the text in a principled way that takes into account the history, structure, and underlying values of the document.[12] Only when the means of solution afforded by the entire constitution have been exhausted without success is the court justified in calling outside facts or considerations to its aid.[13] When that becomes necessary, it is permissible to inquire into the prior state of the law, the previous and contemporary history of the people, the circumstances attending the adoption of the organic law, as well as broad considerations of expediency.[14] In so doing, the court may avail itself of any light that may be derived from such those sources, but the court is not bound to adopt it as the sole ground of its decision.[15] In order to animate the meaning intended by the framers of a constitution, a court examines the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of the constitution, and case law interpreting the specific provisions.[16] To ascertain the intent of those by whom the language of the state constitution was used, the court must consider the conditions as they then existed and the purpose sought to be accomplished.[17]

Footnotes

1 Or.—State v. Reinke, 354 Or. 98, 309 P.3d 1059 (2013).

2 Wis.—State v. Williams, 2012 WI 59, 341 Wis. 2d 191, 814 N.W.2d 460 (2012).

3 Haw.—Hanabusa v. Lingle, 105 Haw. 28, 93 P.3d 670 (2004).

Wyo.—Saunders v. Hornecker, 2015 WY 34, 344 P.3d 771 (Wyo. 2015).

Intent reflected in terms of provision

The intent of the people who adopted a constitutional provision are reflected in the terms of the provision.

Tenn.—Cleveland Surgery Center, L.P. v. Bradley County Memorial Hosp., 30 S.W.3d 278 (Tenn. 2000).

Plain and unambiguous language

The supreme court is charged with discerning the intent of the Constitutional Convention, and it looks first to the plain and unambiguous language to discern that intent.

Wyo.—Director of Office of State Lands & Investments v. Merbanco, Inc., 2003 WY 73, 70 P.3d 241, 177 Ed. Law Rep. 558 (Wyo. 2003).

4 N.J.—New Hanover Tp. v. Kelly, 121 N.J. Super. 245, 296 A.2d 554 (Law Div. 1972).

Extrinsic aids to construction, see §§ 103 et seq.

5 Mont.—Finstad v. W.R. Grace & Co., 2000 MT 228, 301 Mont. 240, 8 P.3d 778 (2000).

Wyo.—Saunders v. Hornecker, 2015 WY 34, 344 P.3d 771 (Wyo. 2015).

6 Mont.—Finstad v. W.R. Grace & Co., 2000 MT 228, 301 Mont. 240, 8 P.3d 778 (2000).

7 U.S.—U.S. v. Classic, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941).

Ill.—Coryn v. City of Moline, 71 Ill. 2d 194, 15 Ill. Dec. 776, 374 N.E.2d 211 (1978).

La.—Barnett v. Develle, 289 So. 2d 129 (La. 1974).

Wyo.—Saunders v. Hornecker, 2015 WY 34, 344 P.3d 771 (Wyo. 2015).

No evidence of contrary intent

A discussion among a small number of legislators three years after a constitutional amendment was adopted could not serve to demonstrate an intent contrary to the one that was most reasonably ascribed to the legislators and the voting population as a whole at the time the constitutional provision was adopted.

La.—East Baton Rouge Parish School Bd. v. Foster, 851 So. 2d 985, 180 Ed. Law Rep. 356 (La. 2003).

8 Cal.—Massachusetts Mutual Life Ins. Co. v. City and County of San Francisco, 129 Cal. App. 3d 876, 181 Cal. Rptr. 370 (1st Dist. 1982) (disapproved of on other grounds by, Mutual Life Ins. Co. v. City of Los Angeles, 50 Cal. 3d 402, 267 Cal. Rptr. 589, 787 P.2d 996 (1990)).

Fla.—In re Advisory Opinion to Governor Request of June 29, 1979, 374 So. 2d 959 (Fla. 1979).

N.Y.—Pfingst v. State, 57 A.D.2d 163, 393 N.Y.S.2d 803 (3d Dep't 1977).

9 Mich.—Adair v. State, 470 Mich. 105, 680 N.W.2d 386, 188 Ed. Law Rep. 449 (2004).

10 Mich.—Adair v. State, 470 Mich. 105, 680 N.W.2d 386, 188 Ed. Law Rep. 449 (2004).

11 U.S.—Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. 2014).

12 Tenn.—Cleveland Surgery Center, L.P. v. Bradley County Memorial Hosp., 30 S.W.3d 278 (Tenn. 2000).

13 Md.—Miles v. State, 435 Md. 540, 80 A.3d 242 (2013).

14 Md.—Miles v. State, 435 Md. 540, 80 A.3d 242 (2013).

15 Md.—Miles v. State, 435 Md. 540, 80 A.3d 242 (2013).

16 Ind.—Embry v. O'Bannon, 798 N.E.2d 157, 182 Ed. Law Rep. 325 (Ind. 2003) (holding modified on other grounds by, Meredith v. Pence, 984 N.E.2d 1213, 290 Ed. Law Rep. 998 (Ind. 2013)).

Or.—Yancy v. Shatzer, 337 Or. 345, 97 P.3d 1161 (2004).

17 N.C.—State v. Webb, 358 N.C. 92, 591 S.E.2d 505 (2004).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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A. Construction

2. Intent and Purpose

§ 86. Sources for determining intent—Intent of voters adopting initiative

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 584 to 589

In interpreting voter-initiated constitutional provisions, a court's goal is to discern the intent of the voters.

In interpreting voter-initiated constitutional provisions, a court's goal is to discern the intent of the voters.[1] In doing so, the text of the constitutional provision itself provides the best evidence of the voters' intent[2] although the context of the language of the ballot measure may also be considered,[3] as well as ballot summaries and arguments.[4] There is authority that the intent of voters adopting an initiative amendment to a constitution must be determined from the words of the initiative amendment itself because there is no meaningful way to determine the intent that motivates voters to sign a petition for the submission of the enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of the enactment.[5] If the voters' intent is clear from the text and context, then the court does not look further, but the court will consider the history of the provision in an effort to resolve the matter if the meaning of the provision remains ambiguous.[6]

Footnotes

1 Or.—Li v. State, 338 Or. 376, 110 P.3d 91 (2005).

2 Or.—Li v. State, 338 Or. 376, 110 P.3d 91 (2005).

3 Or.—Stranahan v. Fred Meyer, Inc., 331 Or. 38, 11 P.3d 228 (2000).

4 Cal.—City of San Buenaventura v. United Water Conservation District, 235 Cal. App. 4th 228, 185 Cal. Rptr. 3d 207 (2d Dist. 2015), as modified on denial of reh'g, (Apr. 15, 2015).

5 Neb.—Pig Pro Nonstock Co-op. v. Moore, 253 Neb. 72, 568 N.W.2d 217 (1997).

6 Or.—Li v. State, 338 Or. 376, 110 P.3d 91 (2005).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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A. Construction

2. Intent and Purpose

§ 87. Wisdom and policy of constitutional provision

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 584 to 589

Questions as to the wisdom, expediency, or justice of constitutional provisions afford no basis for construction where the intent to adopt such provisions is expressed in clear and unmistakable terms; however, broad considerations of expediency may be considered, as one extrinsic factor, once the means of solution afforded by the entire constitution have been exhausted without success.

Courts are not concerned with the wisdom or expediencies of constitutional provisions,[1] and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution.[2] So long as the legislative act is not forbidden,[3] the only judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom.[4] An unexpressed policy may not be read into a constitutional provision by means of construction,[5] and the courts cannot engraft an exception onto the constitution, no matter how desirable or expedient the exception might seem.[6] The remedy for unwise or unjust constitutional provisions is to seek a constitutional amendment.[7]

However, there is authority that broad considerations of expediency may be considered, as one extrinsic factor, once the means of solution afforded by the entire constitution have been exhausted without success.[8] Thus, in case of doubt concerning the real meaning of a constitutional provision, an interpretation that most promotes the public interest and wise policy may be adopted[9] if it is possible to do so without violating the provision's plain terms.[10] The courts will not ignore the general spirit of the constitution in construing its provisions[11] since the actual intent and purpose is sought rather than the strict linguistic interpretation.[12]

Footnotes

1 Wash.—City of Bothell v. Barnhart, 172 Wash. 2d 223, 257 P.3d 648 (2011).
W. Va.—State ex rel. West Virginia Citizen Action Group v. Tomblin, 227 W. Va. 687, 715 S.E.2d 36 (2011).
Facial challenge
A party's attacks on the wisdom of a statute should not be addressed by an appellate court on review of the party's facial constitutional challenges to the statute since such attacks do not impact the constitutional analysis.
Tex.—H.K. Global Trading, Ltd. v. Combs, 429 S.W.3d 132 (Tex. App. Austin 2014), review denied, (Aug. 15, 2014).

2 U.S.—Wyley v. Warden, Md. Penitentiary, 372 F.2d 742 (4th Cir. 1967).
Fla.—Austin v. State ex rel. Christian, 310 So. 2d 289 (Fla. 1975).
W. Va.—State ex rel. West Virginia Citizen Action Group v. Tomblin, 227 W. Va. 687, 715 S.E.2d 36 (2011).

3 N.C.—Saine v. State, 210 N.C. App. 594, 709 S.E.2d 379, 267 Ed. Law Rep. 897 (2011).

4 Ohio—Oaktree Condominium Assn. v. Hallmark Bldg. Co., 2012-Ohio-3891, 975 N.E.2d 1068 (Ohio Ct. App. 11th Dist. Lake County 2012), appeal allowed, 134 Ohio St. 3d 1448, 2013-Ohio-347, 982 N.E.2d 727 (2013) and aff'd on other grounds, 139 Ohio St. 3d 264, 2014-Ohio-1937, 11 N.E.3d266 (2014).

5 Ill.—People ex rel. McDavid v. Barrett, 370 Ill. 478, 19 N.E.2d 356, 121 A.L.R. 1311 (1939).
Ky.—Pardue v. Miller, 306 Ky. 110, 206 S.W.2d 75 (1947).
N.C.—Town of Warrenton v. Warren County, 215 N.C. 342, 2 S.E.2d 463 (1939).

6 Wash.—City of Bothell v. Barnhart, 172 Wash. 2d 223, 257 P.3d 648 (2011).

7 Or.—State ex rel. Umatilla County v. Davis, 161 Or. 127, 88 P.2d 314 (1939).

8 Md.—Miles v. State, 435 Md. 540, 80 A.3d 242 (2013).

9 Fla.—Austin v. State ex rel. Christian, 310 So. 2d 289 (Fla. 1975).
Mass.—Opinion of the Justices, 362 Mass. 895, 284 N.E.2d 908 (1972).

10 N.J.—Behnke v. New Jersey Highway Authority, 13 N.J. 14, 97 A.2d 647 (1953).

11 Pa.—Pennsylvania Prison Soc. v. Com., 565 Pa. 526, 776 A.2d 971 (2001).
Wyo.—Cathcart v. Meyer, 2004 WY 49, 88 P.3d 1050 (Wyo. 2004).

12 U.S.—Weiss v. Stearn, 265 U.S. 242, 44 S. Ct. 490, 68 L. Ed. 1001, 33 A.L.R. 520 (1924).
N.M.—Board of County Com'rs of Bernalillo County v. McCulloh, 1948-NMSC-028, 52 N.M. 210, 195 P.2d 1005 (1948).
N.C.—In re Advisory Opinion to Governor, 223 N.C. 845, 28 S.E.2d 567 (1944).
Wash.—Boeing Aircraft Co. v. Reconstruction Finance Corp., 25 Wash. 2d 652, 171 P.2d 838, 168 A.L.R. 539 (1946).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

2. Intent and Purpose

§ 88. Effect and consequences of construction

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 584 to 589

Although a construction that will work a hardship or absurdity should be avoided if possible, it is not permissible to construe away a provision of a constitution merely because it may appear to work injustice or lead to harsh or obnoxious consequences.

When a constitutional provision is not clear, the court may look to the effects and consequences of the law, among other factors.[1] However, it is not permissible to disobey, or to construe away, a provision of a constitution merely because it may appear to work injustice or lead to either harsh or obnoxious consequences or invidious and unmerited discriminations.[2] Although a plain and unambiguous constitutional provision should be enforced regardless of the fact that it may work inconvenience or hardship to some persons,[3] the court should, if it all possible, construe the document in a manner that will make it reasonable,[4] particularly if the meaning is doubtful.[5]

Whenever possible,[6] courts should avoid a literalism that creates absurd, arbitrary, or unintended results.[7] Furthermore, the purpose and scope of a constitutional provision is measured by the principles underlying the words used rather than the direct

operation or literal meaning of the language.[8] When a construction is urged that would result in an absurd situation or when provisions are subject to conflicting interpretations, the court looks beyond the plain language of the constitutional provision to ascertain the enactors' intent.[9] Thus, a court is not bound to follow a literal interpretation that is contrary to the intention of the framers of a constitution and leads to an absurdity,[10] a contradiction,[11] great public inconvenience or unjust discrimination,[12] or an extreme hardship or great injustice.[13] Indeed, the practical operation and effect of a constitutional provision may control its interpretation.[14] Constitutional provisions will not be construed to require an impossible or thoroughly impracticable action[15] or one that is unreasonable.[16] Furthermore, a court may not presume an intention to take away or destroy individual rights[17] or to insert a provision in a constitution that is without reason.[18]

Footnotes

1 Ariz.—Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Gynecologists, 227 Ariz. 262, 257 P.3d 181 (Ct. App. Div. 1 2011).

2 Fla.—In re Advisory Opinion to Governor Request of June 29, 1979, 374 So. 2d 959 (Fla. 1979).

3 Cal.—Stockburger v. Jordan, 10 Cal. 2d 636, 76 P.2d 671 (1938).
Colo.—City and County of Denver v. People, 103 Colo. 565, 88 P.2d 89 (1939).
Tex.—Cramer v. Sheppard, 140 Tex. 271, 167 S.W.2d 147 (1942).

4 Colo.—People v. Fioco, 2014 COA 22, 342 P.3d 530 (Colo. App. 2014), cert. denied, 2015 WL 339312 (Colo. 2015).
Mass.—Opinion of Justices to House of Representatives, 384 Mass. 820, 425 N.E.2d 750 (1981).

5 Ohio—State ex rel. Rhodes v. Brown, 34 Ohio St. 2d 101, 63 Ohio Op. 2d 189, 296 N.E.2d 538 (1973).
Unclear or ambiguous provisions, see § 84.

6 Cal.—Richmond v. Shasta Community Services Dist., 32 Cal. 4th 409, 9 Cal. Rptr. 3d 121, 83 P.3d 518 (2004).
Ind.—Snyder v. King, 958 N.E.2d 764 (Ind. 2011).

7 Cal.—Richmond v. Shasta Community Services Dist., 32 Cal. 4th 409, 9 Cal. Rptr. 3d 121, 83 P.3d 518 (2004).

8 Fla.—Coastal Florida Police Benev. Ass'n, Inc. v. Williams, 838 So. 2d 543 (Fla. 2003).

9 Nev.—Guinn v. Legislature of State of Nev., 119 Nev. 460, 76 P.3d 22 (2003).

10 Cal.—Stanton v. Panish, 28 Cal. 3d 107, 167 Cal. Rptr. 584, 615 P.2d 1372 (1980).
Colo.—People v. Fioco, 2014 COA 22, 342 P.3d 530 (Colo. App. 2014), cert. denied, 2015 WL 339312 (Colo. 2015).
Fla.—In re Advisory Opinion to Governor Request of June 29, 1979, 374 So. 2d 959 (Fla. 1979).
Haw.—Schwab v. Ariyoshi, 58 Haw. 25, 564 P.2d 135 (1977).

11 Ark.—Bailey v. Abington, 201 Ark. 1072, 148 S.W.2d 176 (1941).
Mo.—State ex rel. Moore v. Toberman, 363 Mo. 245, 250 S.W.2d 701 (1952).

12 Tex.—Railroad Commission v. St. Louis Southwestern Ry. Co., 443 S.W.2d 71 (Tex. Civ. App. Austin 1969), writ refused n.r.e., (Oct. 29, 1969).

13 Cal.—Stanton v. Panish, 28 Cal. 3d 107, 167 Cal. Rptr. 584, 615 P.2d 1372 (1980).
Mo.—Theodoro v. Dept. of Liquor Control, 527 S.W.2d 350 (Mo. 1975).

14 Fla.—Latham v. Hawkins, 121 Fla. 324, 163 So. 709 (1935).

15 Miss.—Gulf Refining Co. v. Stone, 197 Miss. 713, 21 So. 2d 19 (1945).

16 Cal.—Pollack v. Hamm, 3 Cal. 3d 264, 90 Cal. Rptr. 181, 475 P.2d 213 (1970).
Colo.—People v. Fioco, 2014 COA 22, 342 P.3d 530 (Colo. App. 2014), cert. denied, 2015 WL 339312 (Colo. 2015).

17 Fla.—Getzen v. Sumter County, 89 Fla. 45, 103 So. 104 (1925).
Ga.—McIntyre v. Harrison, 172 Ga. 65, 157 S.E. 499 (1931).

18 Ill.—Mitchell v. Lowden, 288 Ill. 327, 123 N.E. 566 (1919).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

3. Meaning of Language

§ 89. Meaning of constitutional language, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 589, 591 to 594

Unless to do so would contravene the manifest intention of the framers, the language of a constitutional provision should be construed as it is written, and the words employed should be given their natural and obvious signification, with due regard for rules of grammar and punctuation.

The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself.[1] Unless a contrary intention is evident, words that have a constitutional or statutory definition are usually given that interpretation.[2] Accordingly, if words or terms have received a definite meaning and application from legislative and judicial interpretation, ordinarily, they should be given that meaning,[3] and decisions in other states bearing on the same or similar constitutional language are afforded persuasive effect.[4] If a legislature has provided an express definition of a term, that definition ordinarily is binding on the courts.[5] Accordingly, the rule holding that when a term has been given a particular meaning by a judicial decision it should be presumed to have the same meaning in later-enacted statutes or constitutional provisions does not apply when the statute or constitutional provision contains its own definition of the term at issue.[6]

Although an essential part of the process of interpreting constitutions is the drawing of distinctions, including fine ones,[7] courts will accord language its reasonable interpretation.[8] However, neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision.[9] The general rule is that if the language used in a constitutional provision is clear and unambiguous, its meaning and intent are to be ascertained from the instrument itself by construing the language as it is written.[10] It is presumed that the people know the meaning of the words they use in a constitutional provision and that they use them according to their plain, natural, and usual signification and import.[11] A court is not at liberty to presume that the framers of a constitution, or the people who adopted it, did not understand the force of language.[12]

In interpreting a constitutional provision, the court's task is not to impose on the constitutional text the meaning the court would prefer, or even the meaning the people today would prefer, but to search for contextual clues about what meaning the people who ratified the text gave to it.[13] However, it has also been said that words in a constitution need not be given only the meaning known to the framers at the time of promulgation.[14] If words are used in a constitution in both a restricted and general sense, the general must prevail over the restricted unless the nature of the subject matter or the context indicates that the limited sense was intended.[15]

Amendments.

In interpreting and construing a constitutional amendment, the court must examine the language used and consider it in connection with the general surrounding facts and circumstances that cause the amendment to be submitted.[16]

CUMULATIVE SUPPLEMENT

Cases:

Interpretation of any provision of the Constitution must begin with a consideration of the literal meaning of that particular provision. Tennessee Wine and Spirits Retailers Association v. Thomas, 139 S. Ct. 2449 (2019).

The private intent behind a drafter's rejection of one version of constitutional text is shoddy evidence of the public meaning of an altogether different text. Gamble v. United States, 139 S. Ct. 1960 (2019).

[END OF SUPPLEMENT]

Footnotes

1 Ark.—State v. Cassell, 2013 Ark. 221, 427 S.W.3d 663 (2013).
Fla.—West Florida Regional Medical Center, Inc. v. See, 79 So. 3d 1 (Fla. 2012).
La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).
Ohio—State ex rel. King v. Summit Cty. Council, 99 Ohio St. 3d 172, 2003-Ohio-3050, 789 N.E.2d 1108 (2003).
Utah—Anderson v. United Parcel Service, 2004 UT 57, 96 P.3d 903 (Utah 2004).

2 Cal.—County of Fresno v. Malmstrom, 94 Cal. App. 3d 974, 156 Cal. Rptr. 777 (5th Dist. 1979).
Pa.—Marston v. Kline, 8 Pa. Commw. 143, 301 A.2d 393 (1973).

3 Ill.—Paper Supply Co. v. City of Chicago, 57 Ill. 2d 553, 317 N.E.2d 3 (1974).
Presumption of awareness

Framers of constitution are presumed to have been aware of prior decisions of their own courts and of legislative acts construing words or phrases and to have used such words or phrases in light of such construction.

Va.—City of Roanoke v. James W. Michael's Bakery Corp., 180 Va. 132, 21 S.E.2d 788 (1942).

Aid or guide; conclusiveness

Miss.—State ex rel. Muirhead v. State Bd. of Election Com'rs, 259 So. 2d 698 (Miss. 1972).

Pa.—Marston v. Kline, 8 Pa. Commw. 143, 301 A.2d 393 (1973).

Statutory construction

Tenn.—Dixie Rents, Inc. v. City of Memphis, 594 S.W.2d 397 (Tenn. Ct. App. 1979).

4 Wyo.—Saunders v. Hornecker, 2015 WY 34, 344 P.3d 771 (Wyo. 2015).

5 Cal.—Richmond v. Shasta Community Services Dist., 32 Cal. 4th 409, 9 Cal. Rptr. 3d 121, 83 P.3d 518 (2004).

6 Cal.—Richmond v. Shasta Community Services Dist., 32 Cal. 4th 409, 9 Cal. Rptr. 3d 121, 83 P.3d 518 (2004).

7 U.S.—Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

8 Wash.—Washington Water Jet Workers Ass'n v. Yarbrough, 151 Wash. 2d 470, 90 P.3d 42 (2004), as amended, (May 27, 2004).

Limitations

In applying the rule that constitutional language must be allowed to speak for itself, judicial deference must be paid to offsetting and equally constraining rules; first, constitutions receive a broader and more liberal construction than statutes, and second, constitutional provisions should not be construed so as to defeat their underlying objectives.

Fla.—Coastal Florida Police Benev. Ass'n, Inc. v. Williams, 838 So. 2d 543 (Fla. 2003).

9 Ark.—Smith v. Sidney Moncrief Pontiac, Buick, GMC Co., 353 Ark. 701, 120 S.W.3d 525 (2003).

Fla.—Ford v. Browning, 992 So. 2d 132 (Fla. 2008).

10 U.S.—U.S. v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).

Colo.—Davidson v. Sandstrom, 83 P.3d 648 (Colo. 2004).

Haw.—Hanabusa v. Lingle, 105 Haw. 28, 93 P.3d 670 (2004).

Plain and unambiguous language must be given effect

La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).

Plain meaning is meaning given words

In analyzing constitutional language, the first inquiry is to determine if the words have a plain meaning or are obvious on their face; if they are, that plain meaning is the meaning given them.

Mich.—Silver Creek Drain Dist. v. Extrusions Div., Inc., 468 Mich. 367, 663 N.W.2d 436 (2003).

11 Utah—Block v. Vigil-Giron, 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72 (2004).

12 Wyo.—Geringer v. Bebout, 10 P.3d 514 (Wyo. 2000).

13 Mich.—People v. Nutt, 469 Mich. 565, 677 N.W.2d 1 (2004).

14 Md.—Boyer v. Thurston, 247 Md. 279, 231 A.2d 50 (1967).

Pa.—Evans v. West Norriton Tp. Municipal Authority, 370 Pa. 150, 87 A.2d 474 (1952).

15 N.M.—Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd., 80 N.M. 633, 1969-NMCA-089, 459 P.2d 159 (Ct. App. 1969).

Wash.—State ex rel. Linn v. Superior Court for King County, 20 Wash. 2d 138, 146 P.2d 543 (1944).

Conflict between general and special provisions, see § 101.

16 Kan.—In re Cent. Illinois Public Services Co., 276 Kan. 612, 78 P.3d 419 (2003).

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A. Construction

3. Meaning of Language

§ 90. Uniformity of meaning

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 589, 591 to 594

Unless it clearly appears, from the context or otherwise, that a different meaning should be applied, the same meaning attaches to a given word or phrase repeated in a constitution wherever it occurs within the document.

Unless it clearly appears, from the context or otherwise, that a different meaning should be applied,[1] the same meaning attaches to a given word or phrase repeated in a constitution wherever it occurs within the document.[2] However, a difference in meaning is assumed if two parts of constitutional provision use different language to address the same or similar subject matter.[3]

Footnotes

1 Ga.—Clarke v. Johnson, 199 Ga. 163, 33 S.E.2d 425 (1945).
Ind.—Kirkpatrick v. King, 228 Ind. 236, 91 N.E.2d 785 (1950).
Miss.—State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374 (1932).
As to necessity of uniformity of construction, see § 79.

2 U.S.—Cherokee Nation v. State of Ga., 30 U.S. 1, 8 L. Ed. 25, 1831 WL 3974 (1831); Ogden v. Saunders, 25 U.S. 213, 6 L. Ed. 606, 1827 WL 3055 (1827).
Ga.—Clarke v. Johnson, 199 Ga. 163, 33 S.E.2d 425 (1945).
Ind.—Kirkpatrick v. King, 228 Ind. 236, 91 N.E.2d 785 (1950).
Mich.—City of Jackson v. Nims, 316 Mich. 694, 26 N.W.2d 569 (1947).
Mo.—Rathjen v. Reorganized School Dist. R-II of Shelby County, 365 Mo. 518, 284 S.W.2d 516 (1955).

3 U.S.—Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).

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§ 91. Rules of grammar and punctuation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 589, 591 to 594

When construing constitutional provisions, the ordinary rules of grammar will usually be applied so long as the intent of the instrument as gathered from the whole is not thereby destroyed, and furthermore, punctuation is not considered a part of an enactment and thus is not a controlling interpretive factor.

The first resort in all cases is to the natural signification of the words used, in the order and grammatical arrangement in which the framers have placed them.[1] If, thus regarded, the words used convey a definite meaning which involves no absurdity and no contradiction between parts of the same writing, then the meaning apparent on the face of the instrument is the one which alone courts are at liberty to say was intended to be conveyed.[2] When interpreting a constitutional provision, the grammatical order and selection of the associated words as arranged by the drafters is indicative of the natural significance of the words employed, and to this extent, the intent of the amendment's drafters is influential.[3] The requirement that there be a logical connection between a stated purpose in a prefatory clause and a command in an operative clause in a constitutional provision may cause a prefatory clause to resolve an ambiguity in the operative clause, but apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.[4] If the text of a clause indicates that it does not have operative effect, such

as "whereas" clauses in federal legislation or the Federal Constitution's preamble, a court has no license to make it do what it was not designed to do as operative provisions should be given effect as operative provisions and prologues as prologues.[5]

To help discern the meaning of a constitutional provision, a court may apply traditional rules of grammar[6] but not to the extent of using technical rules that would defeat the intent of the instrument as gathered from the whole.[7] In conformity with grammatical rules, relative and qualifying words and phrases will be construed to refer solely to the last antecedent with which they are closely connected, absent a contrary intention.[8] On the other hand, when to do so promotes the intention of the instrument, a court may imply a negative from affirmative words[9] or transpose sentences or sections.[10]

Depending on the context, placement, and use of the word "shall," and the nature of the constitutional provision in which it appears, the word may have a mandatory connotation, so as to require that the action that "shall" be done must be done, or may be directory in meaning, so as to merely exhort the doing of the thing that "shall" be done without requiring it.[11] The word "necessary" in constitution does not mean essential; it means expedient to task at hand since the holder of legislative power defines what tasks to pursue and may choose how strong the support for the new rules needs to be.[12] When harmonizing constitutional provisions to avoid absurd or unreasonable results, "or" and "and" may be construed as interchangeable.[13]

As a general rule, punctuation is not considered a part of an enactment,[14] and so, it is not a controlling factor in constitutional interpretation.[15] Punctuation will be resorted to as an aid in the construction of the enactment when it tends to throw light on the meaning,[16] but it may be disregarded when necessary to ascertain the true meaning of the constitutional language.[17]

Footnotes

1 U.S.—In re Ames Dept. Stores, Inc., 316 B.R. 772 (Bankr. S.D. N.Y. 2004) (stating New Hampshire law).
Ind.—City of Fort Wayne v. Consolidated Elec. Distributors, Inc., 998 N.E.2d 733 (Ind. Ct. App. 2013), transfer denied, 10 N.E.3d 9 (Ind. 2014).
Associated words
Grammatical order and selection of associated words as arranged by drafters of constitution is indicative of natural significance of words employed.
Mo.—Boone County Court v. State, 631 S.W.2d 321 (Mo. 1982).

2 U.S.—In re Ames Dept. Stores, Inc., 316 B.R. 772 (Bankr. S.D. N.Y. 2004) (stating New Hampshire law).
Colo.—Lidke v. Industrial Com'n, 159 Colo. 580, 413 P.2d 200 (1966).
Mich.—American Youth Foundation v. Benona Tp., 8 Mich. App. 521, 154 N.W.2d 554 (1967).
N.M.—State ex rel. Chavez v. Evans, 1968-NMSC-167, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).
Aim evident and unequivocal
Where the language of a constitutional prohibition makes its aim evident and unequivocal, courts need not consider the historical basis for the prohibition and may not, by separately considering related constitutional provisions, arrive at a construction that detracts from the effectiveness or manifest meaning and purpose of the related provisions.
La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).

3 Mo.—State v. Honeycutt, 421 S.W.3d 410 (Mo. 2013), as modified, (Dec. 24, 2013).

4 U.S.—District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (interpreting Second Amendment Prefatory Clause).

5 U.S.—District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

6 Ariz.—Garvey v. Trew, 64 Ariz. 342, 170 P.2d 845 (1946).
Wash.—Dress v. Washington State Dept. of Corrections, 168 Wash. App. 319, 279 P.3d 875 (Div. 1 2012).

7 U.S.—Cohens v. State of Virginia, 19 U.S. 264, 5 L. Ed. 257, 1821 WL 2186 (1821).
Ariz.—State ex rel. La Prade v. Cox, 43 Ariz. 174, 30 P.2d 825 (1934).

8 Ga.—Thompson v. Talmadge, 201 Ga. 867, 41 S.E.2d 883 (1947).
Wash.—State v. Haye, 72 Wash. 2d 461, 433 P.2d 884 (1967).
9 U.S.—Cohens v. State of Virginia, 19 U.S. 264, 5 L. Ed. 257, 1821 WL 2186 (1821).
R.I.—In re Opinion to the Governor, 55 R.I. 56, 178 A. 433 (1935).
10 Ariz.—Gherna v. State, 16 Ariz. 344, 146 P. 494 (1915).
Cal.—People v. Zolotoff, 48 Cal. App. 2d 360, 119 P.2d 745 (1st Dist. 1941).
11 Md.—In re Abiagail C., 138 Md. App. 570, 772 A.2d 1277 (2001).
12 U.S.—Serpico v. Laborers' Intern. Union of North America, 97 F.3d 995 (7th Cir. 1996).
13 Ala.—In re Opinion of the Justices, 252 Ala. 194, 41 So. 2d 559 (1949).
14 Mass.—Cushing v. Worrick, 75 Mass. 382, 9 Gray 382, 1857 WL 6100 (1857).
Utah—Richardson v. Treasure Hill Min. Co., 23 Utah 366, 65 P. 74 (1901).
15 Cal.—Roth Drugs v. Johnson, 13 Cal. App. 2d 720, 57 P.2d 1022 (3d Dist. 1936).
16 Mass.—In re Opinion of the Justices, 286 Mass. 611, 191 N.E. 33 (1934).
17 Cal.—Roth Drugs v. Johnson, 13 Cal. App. 2d 720, 57 P.2d 1022 (3d Dist. 1936).
Ga.—Slaten v. Travelers Ins. Co., 197 Ga. 1, 28 S.E.2d 280 (1943).

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III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

3. Meaning of Language

§ 92. Plain or common-sense meaning

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 583, 585 to 589, 596, 1067

In interpreting a constitution, unless the context suggests otherwise, words must be given their natural, obvious, plain, ordinary, or common meaning.

In interpreting a constitution, unless the context suggests otherwise, words must be given their natural, obvious, plain, ordinary, or common meaning.[1] The presumption favors the natural and popular meaning in which the words are usually understood by the people who adopted them[2] unless the context furnishes some ground to control, qualify, or enlarge them.[3] The court looks first to the plain language of the provision, and if the meaning of that language is unambiguous, the court does not look beyond it unless it is clear that the ordinary meaning was not intended by the drafters.[4] Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning.[5] The words used in the constitution are to be taken in their natural and obvious sense and are to be given the meaning they have in common use unless there are very strong reasons to the contrary.[6] A court ordinarily resolves questions that arise under a constitution by examining the language of text in the context of the history surrounding its drafting and ratification.[7] Accordingly, a court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification.[8]

There is no occasion for construction if the language is plain and definite,[9] and a court will not search for a meaning elsewhere if the meaning is clear from the words used.[10] A court must always be reluctant to stretch the meanings of words and should be particularly careful not to give them a flavor or a limit they were not intended to have, and court should be doubly hesitant when the words define constitutional rights.[11] Forced, subtle, strained, or unusual definitions should never be resorted to for the purpose of limiting or extending the operation of unambiguous language.[12]

A constitution should receive a reasonable and practical interpretation that accords with common sense.[13] Thus, a court should not construe a constitutional provision to arrive at a strained, impractical, or absurd result[14] or to create absurd consequences or public mischief.[15]

CUMULATIVE SUPPLEMENT

Cases:

To determine electorate's intent in adopting a constitutional provision, court gives the words their ordinary meaning, unless the context suggests a different one. State ex rel. Brnovich v. City of Phoenix, 468 P.3d 1200 (Ariz. 2020).

Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning. Town of Lead Hill v. Ozark Mountain Regional Public Water Authority of State, 2015 Ark. 360, 472 S.W.3d 118 (2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).
Ala.—Magee v. Boyd, 2015 WL 867926 (Ala. 2015).
Colo.—People v. Fioco, 2014 COA 22, 342 P.3d 530 (Colo. App. 2014), cert. denied, 2015 WL 339312 (Colo. 2015).
R.I.—Woonsocket School Committee v. Chafee, 89 A.3d 778, 303 Ed. Law Rep. 924 (R.I. 2014).
Tex.—Bank of New York Mellon v. Daryapayma, 2015 WL 708620 (Tex. App. Dallas 2015).
Wisc.—Appling v. Walker, 2014 WI 96, 358 Wis. 2d 132, 853 N.W.2d 888 (2014).
Wyo.—Riedel v. Anderson, 2003 WY 70, 70 P.3d 223, 177 Ed. Law Rep. 545 (Wyo. 2003).
Generally understood meaning
La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).
Terms not defined
Words used in the constitution that are not defined in it must be taken in their usual, normal, or customary meaning.
Ohio—State ex rel. King v. Summit Cty. Council, 99 Ohio St. 3d 172, 2003-Ohio-3050, 789 N.E.2d 1108 (2003).
Constitution adopted directly by the people
State constitution was adopted directly by the people, and for that reason, its words should be construed in the manner most consistent with common understanding.
Wis.—Wagner v. Milwaukee County Election Com'n, 2003 WI 103, 263 Wis. 2d 709, 666 N.W.2d 816 (2003).

2 U.S.—U.S. v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).
Haw.—Watland v. Lingle, 104 Haw. 128, 85 P.3d 1079 (2004), as clarified, (Mar. 19, 2004).

Okla.—In re Oklahoma Capitol Imp. Authority, 2003 OK 59, 80 P.3d 109 (Okla. 2003).

Pa.—In re Bruno, 101 A.3d 635 (Pa. 2014).

Rule of common understanding

In discerning the original meaning attributed to the words of a provision of the state constitution by its ratifiers, the court applies the "rule of common understanding," under which the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have ratified the instrument in the belief that that was the sense designed to be conveyed.

Mich.—People v. Nutt, 469 Mich. 565, 677 N.W.2d 1 (2004).

Meaning to electorate

When interpreting a constitutional provision, a court will look to its purpose and intent, bearing in mind that it will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast.

N.H.—In re Below, 151 N.H. 135, 855 A.2d 459 (2004).

Great mass of the people

The interpretation that should be given to state constitution is that which reasonable minds, the great mass of the people themselves, would give to it.

Mich.—Adair v. State, 470 Mich. 105, 680 N.W.2d 386, 188 Ed. Law Rep. 449 (2004).

3 Haw.—Watland v. Lingle, 104 Haw. 128, 85 P.3d 1079 (2004), as clarified, (Mar. 19, 2004).

4 Nev.—City of Sparks v. Sparks Mun. Court, 302 P.3d 1118, 129 Nev. Adv. Op. No. 38 (Nev. 2013).

5 Ark.—Bayer CropScience LP v. Schafer, 2011 Ark. 518, 385 S.W.3d 822 (2011).

6 S.D.—Doe v. Nelson, 2004 SD 62, 680 N.W.2d 302 (S.D. 2004).

7 Ind.—Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003).

8 N.H.—In re Below, 151 N.H. 135, 855 A.2d 459 (2004).

Mich.—County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004).

Wash.—Eggleston v. Pierce County, 148 Wash. 2d 760, 64 P.3d 618 (2003).

9 U.S.—Wright v. U.S., 302 U.S. 583, 58 S. Ct. 395, 82 L. Ed. 439 (1938).

Idaho—Hayes v. Kingston, 140 Idaho 551, 96 P.3d 652 (2004).

La.—CITGO Petroleum Co. v. Louisiana Public Service Com'n, 898 So. 2d 291 (La. 2005).

N.M.—State v. Lynch, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73 (2003).

Wyo.—Cathcart v. Meyer, 2004 WY 49, 88 P.3d 1050 (Wyo. 2004).

No further inquiry

If a court finds the plain meaning of that language to be unambiguous, the court need not inquire further.

Utah—Anderson v. United Parcel Service, 2004 UT 57, 96 P.3d 903 (Utah 2004).

10 N.C.—State v. Webb, 358 N.C. 92, 591 S.E.2d 505 (2004).

11 U.S.—Peterson v. Williams, 85 F.3d 39 (2d Cir. 1996).

12 Ala.—McGee v. Borom, 341 So. 2d 141 (Ala. 1976).

Colo.—Mulvey v. Civil Service Commission of City and County of Denver, 509 P.2d 808 (Colo. App. 1973).

Pa.—Com. v. Harmon, 469 Pa. 490, 366 A.2d 895 (1976).

Engrafting exception

It is not for court to engraft an exception where none is expressed in constitution.

Wash.—State ex rel. O'Connell v. Slavin, 75 Wash. 2d 554, 452 P.2d 943 (1969).

13 Alaska—Sullivan v. Resisting Environmental Destruction on Indigenous Lands (REDOIL), 311 P.3d 625 (Alaska 2013).

Natural and technical meaning of words, see § 94.

14 N.D.—Kelsh v. Jaeger, 2002 ND 53, 641 N.W.2d 100 (N.D. 2002).

S.D.—State v. Allison, 2000 SD 21, 607 N.W.2d 1 (S.D. 2000).

15 Nev.—Guinn v. Legislature of State of Nevada, 119 Nev. 277, 71 P.3d 1269, 178 Ed. Law Rep. 524 (2003), decision clarified on denial of reh'g, 119 Nev. 460, 76 P.3d 22 (2003) and (overruled on other grounds by, Nevadans for Nevada v. Beers, 122 Nev. 930, 142 P.3d 339 (2006)).

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A. Construction

3. Meaning of Language

§ 93. Changing or supplying words

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 589, 591 to 594

Ordinarily, a court may not change the wording of a constitutional provision or even correct obvious typographical errors.

Ordinarily, a court may not change the wording of a constitutional provision or even correct obvious typographical errors.[1] If the language is clear, courts may not supply material to remedy what they deem unwise omissions,[2] nor can the legislature or courts add words that substantially add to, or take from, the constitution as framed.[3] However, words may be modified, altered, or supplied if necessary to remedy any repugnance to, or inconsistence with, the intention of the instrument.[4]

Footnotes

1 S.C.—Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973).
Constitutional amendments

In construing a constitutional amendment, the court cannot add or subtract language from the express words of the amendment.

Colo.—Beinor v. Industrial Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011).

2 Ind.—Whitcomb v. Young, 258 Ind. 127, 279 N.E.2d 566 (1972).

N.Y.—Silverman v. Abdul, 85 Misc. 2d 11, 379 N.Y.S.2d 671 (County Ct. 1976).

3 U.S.—United States v. Sprague, 282 U.S. 716, 51 S. Ct. 220, 75 L. Ed. 640, 71 A.L.R. 1381 (1931).

Minn.—State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (1954).

Mont.—Rankin v. Love, 125 Mont. 184, 232 P.2d 998 (1951).

Neb.—Ramsey v. Gage County, 153 Neb. 24, 43 N.W.2d 593 (1950).

4 Ariz.—Board of Sup'rs of Maricopa County v. Pratt, 47 Ariz. 536, 57 P.2d 1220 (1936).

Ark.—Bailey v. Abington, 201 Ark. 1072, 148 S.W.2d 176 (1941).

Date

If a constitutional provision is ambiguous in failing to state the date when its requirements must be met, the court must resolve the ambiguity by filling the gap.

Haw.—Hayes v. Gill, 52 Haw. 251, 473 P.2d 872 (1970).

Intent

The law permits the interpolation of words into a constitutional or statutory provision when necessary to achieve a clear intent.

Tex.—Mauzy v. Legislative Redistricting Bd., 471 S.W.2d 570 (Tex. 1971).

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3. Meaning of Language

§ 94. Technical meaning of words

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 589, 591 to 594

Unless an intention to the contrary is indicated, words used in a constitution will generally be interpreted in their natural or popular, as distinguished from a technical, meaning.

In view of the rule that a constitution is to be construed so as to give effect to the intent and purpose of its framers and the persons who adopted it,[1] and in conformity with the rule that, unless the context suggests otherwise, words are to be given their natural, obvious, and ordinary meaning,[2] words employed in a constitution will not be given a technical meaning unless the nature of the subject matter or the context indicates that they were used in a technical sense.[3] If the text of a constitutional provision does not suggest that a technical meaning was intended, a court is not at liberty to impose a technical meaning by adding words.[4] Since one function of a constitution is to establish the framework and general principles of government, merely technical rules of construction cannot be applied to defeat the principles of the government or the objects of its establishment.[5]

The Federal Constitution was written to be understood by the voters, and its words and phrases were used in their normal and ordinary as distinguished from technical meaning.[6] Normal meaning may include an idiomatic meaning, but it excludes secret

or technical meanings that would not have been known to ordinary citizens in the founding generation.[7] Similarly, language in a state constitution that does indicate that it is used in a technical sense should be understood in its popular, obvious, and natural sense.[8]

If constitutional language has no plain meaning, but is a technical, legal term, a court is to construe those words in their technical, legal sense.[9] The terms are to be interpreted as they are usually understood by a person in the business or profession to which they relate unless this is clearly not intended.[10] If a constitutional phrase is a technical legal term or a phrase of art in the law, the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from the constitutional language that some other meaning was intended.[11]

Footnotes

1 § 83.

2 § 91.

3 U.S.—United States v. Sprague, 282 U.S. 716, 51 S. Ct. 220, 75 L. Ed. 640, 71 A.L.R. 1381 (1931).
Cal.—Fields v. Eu, 18 Cal. 3d 322, 134 Cal. Rptr. 367, 556 P.2d 729 (1976).
Kan.—State ex rel. Schneider v. Kennedy, 225 Kan. 13, 587 P.2d 844 (1978).
N.J.—Whateley v. Leonia Bd. of Ed., 141 N.J. Super. 476, 358 A.2d 826 (Ch. Div. 1976).
Pa.—Com. v. Harmon, 469 Pa. 490, 366 A.2d 895 (1976).
Words not in common use
Cal.—In re Quinn, 35 Cal. App. 3d 473, 110 Cal. Rptr. 881 (5th Dist. 1973) (disapproved of on other grounds by, State of California v. San Luis Obispo Sportsman's Assn., 22 Cal. 3d 440, 149 Cal. Rptr. 482, 584 P.2d 1088 (1978)).

4 Fla.—Garcia v. Andonie, 101 So. 3d 339 (Fla. 2012).
Changing or supplying words in constitutional construction, see § 92.

5 U.S.—Marcus Brown Holding Co. v. Feldman, 269 F. 306 (S.D. N.Y. 1920), aff'd, 256 U.S. 170, 41 S. Ct. 465, 65 L. Ed. 877 (1921).
Mich.—Michigan Nat. Leasing Corp. v. Cardillo, 103 Mich. App. 427, 302 N.W.2d 888 (1981).

6 U.S.—District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); N.L.R.B. v. Enterprise Leasing Co. Southeast, LLC, 722 F.3d 609 (4th Cir. 2013), cert. denied, 134 S. Ct. 2902, 189 L. Ed. 2d 855 (2014).

7 U.S.—District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

8 Okla.—In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Div. of Southern Union Co., for Tax Years 1998, 1999, and 2000, 2008 OK 94, 234 P.3d 938 (Okla. 2008).

9 Mich.—Phillips v. Mirac, Inc., 470 Mich. 415, 685 N.W.2d 174 (2004).

10 Cal.—In re Quinn, 35 Cal. App. 3d 473, 110 Cal. Rptr. 881 (5th Dist. 1973) (disapproved of on other grounds by, State of California v. San Luis Obispo Sportsman's Assn., 22 Cal. 3d 440, 149 Cal. Rptr. 482, 584 P.2d 1088 (1978)).

11 Mich.—Michigan Coalition of State Employee Unions v. Michigan Civil Service Com'n, 465 Mich. 212, 634 N.W.2d 692 (2001).

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3. Meaning of Language

§ 95. Express mention and implied exclusion

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 589, 591 to 594

Unless a different intention is apparent, the enumeration of specified matters in a constitutional provision usually is construed as an exclusion of matters not enumerated.

Courts are obliged to respect not only what constitutional provisions state but also what they do not.[1] Applying the maxim, "expressio unius est exclusio alterius," the enumeration of certain specified things in a constitutional provision will usually be construed to exclude all things not enumerated.[2] This is a rule to be used merely in ascertaining the true meaning, and it is not a rigid rule of universal application,[3] and thus it will yield if a contrary intention appears.[4] However, the rule should never be applied to obscure the meaning or thwart the purpose of a constitutional provision.[5] In particular, the maxim should be applied with caution to provisions of constitutions that concern the legislative branch since the principle cannot restrict the plenary power of the legislature or control an express constitutional provision.[6]

If the legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the disparate inclusion or exclusion was intentional.[7]

Footnotes

1 Or.—State v. Mills, 354 Or. 350, 312 P.3d 515 (2013).

2 U.S.—Williams v. Kansas City, Mo., 104 F. Supp. 848 (W.D. Mo. 1952), judgment aff'd, 205 F.2d 47 (8th Cir. 1953).
Ohio—Stone v. Goolsby, 18 Ohio Misc. 105, 47 Ohio Op. 2d 206, 245 N.E.2d 742 (C.P. 1969).
Wash.—State ex rel. O'Connell v. Slavin, 75 Wash. 2d 554, 452 P.2d 943 (1969).

3 Ala.—In re Opinion of the Justices, 248 Ala. 590, 29 So. 2d 10 (1947).
Wyo.—Chicago & N.W. Ry. Co. v. Hall, 46 Wyo. 380, 26 P.2d 1071 (1933).

4 Cal.—Fields v. Eu, 18 Cal. 3d 322, 134 Cal. Rptr. 367, 556 P.2d 729 (1976).

5 Ala.—In re Opinion of the Justices, 248 Ala. 590, 29 So. 2d 10 (1947).
Mo.—State, on Inf. of McKittrick v. Williams, 346 Mo. 1003, 144 S.W.2d 98 (1940).

6 Ohio—State ex rel. Jackman v. Court of Common Pleas of Cuyahoga County, 9 Ohio St. 2d 159, 38 Ohio Op. 2d 404, 224 N.E.2d 906 (1967).
Taxing power
S.D.—Kramar v. Bon Homme County, 83 S.D. 112, 155 N.W.2d 777 (1968).

7 U.S.—Gallo v. Department of Transp., 725 F.3d 1306 (Fed. Cir. 2013).
N.J.—State v. Buckner, 437 N.J. Super. 8, 96 A.3d 261 (App. Div. 2014), appeal pending, (Oct. 30, 2014).

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3. Meaning of Language

§ 96. Doctrine of "ejusdem generis"; general words following a specific enumeration

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 589, 591 to 594

The doctrine of ejusdem generis applies in the construction of constitutions.

The statutory and constitutional construction principle of "ejusdem generis" provides that where general words or phrases follow an enumeration of specific words or phrases, the general words are construed as applying to the same kind or class as those that are specifically mentioned.[1] The doctrine applies when construing constitutional provisions.[2] However, it is only a rule of construction to aid in arriving at the intent of the instrument and must not be applied in a manner that will thwart that intent.[3]

Words of similar import.

Under the maxim "noscitur a sociis," words of similar import used in association with each other should be construed in the same general sense.[4]

Footnotes

1 Fla.—In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Medical Conditions, 132 So. 3d 786 (Fla. 2014).

2 Ala.—Alabama State Docks Dept. v. Alabama Public Service Commission, 288 Ala. 716, 265 So. 2d 135 (1972).
N.D.—Abbey v. State, 202 N.W.2d 844 (N.D. 1972).

3 Utah—Nephi Plaster & Mfg. Co. v. Juab County, 33 Utah 114, 93 P. 53 (1907).

4 Mo.—State ex rel. Crutcher v. Koeln, 332 Mo. 1229, 61 S.W.2d 750 (1933).
N.J.—State v. Murzda, 116 N.J.L. 219, 183 A. 305 (N.J. Ct. Err. & App. 1936).

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4. Instrument Construed as a Whole

§ 97. Construing constitution as a whole, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 596 to 602

It is a general rule of construction that a constitution should be construed as a whole and effect given to every part if possible.

In ascertaining both the intent and general purpose, as well as the meaning, of a constitution or a part thereof, the court must take the constitution as it is.[1] The instrument should be construed as a whole,[2] and a constitutional provision must be construed in connection with other provisions of the instrument,[3] including those that concern the subject matter under consideration.[4]

As far as possible, all provisions should be construed together so as to harmonize in their application, if possible,[5] with a view to giving effect to each and every provision to the extent consistent with a construction of the instrument as a whole.[6] Thus, every statement in the constitution must be interpreted in light of the entire document rather than as a series of sequestered pronouncements.[7] In interpreting and applying provisions of the state constitution, the court examines the language of the text in the context of (1) the purpose and structure of the constitution[8] and (2) case law interpreting the specific provisions.[9]

Courts construe constitutional provisions and amendments that relate to the same subject matter together and consider those amendments and provisions in light of each other.[10] Whenever possible, a court will construe terms in a constitutional provision in pari materia.[11]

Preambles.

In order to invalidate a statute, preambles may not be invoked apart from specific provisions of the constitutions.[12]

Title to amendment.

The title to an act of the legislature proposing an amendment to the constitution may be resorted to when construing and interpreting the section of the constitution to which it relates.[13]

Division into chapters and sections.

The division of a constitution into chapters and sections is a matter of convenience and is not of significance in applying rules of construction.[14]

CUMULATIVE SUPPLEMENT

Cases:

When interpreting a constitutional provision, the Supreme Court does not read sentences or phrases in isolation, but instead, will examine the whole and every part of a provision, together with others governing the same subject matter, as parts of a system. State v. Lohr, 2020 VT 41, 236 A.3d 1277 (Vt. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Colo.—Town of Frisco v. Baum, 90 P.3d 845 (Colo. 2004).

2 Ariz.—State ex rel. Montgomery v. Mathis, 231 Ariz. 103, 290 P.3d 1226 (Ct. App. Div. 1 2012).
Cal.—Olive Lane Industrial Park, LLC v. County of San Diego, 227 Cal. App. 4th 1480, 174 Cal. Rptr. 3d 577 (4th Dist. 2014).
Colo.—Lobato v. State, 2013 CO 30, 304 P.3d 1132, 295 Ed. Law Rep. 791 (Colo. 2013).
Colo.—Snyder v. King, 958 N.E.2d 764 (Ind. 2011).
Ky.—Legislative Research Com'n v. Fischer, 366 S.W.3d 905 (Ky. 2012).
Pa.—Zauflik v. Pennsbury School Dist., 104 A.3d 1096, 312 Ed. Law Rep. 827 (Pa. 2014).

3 Haw.—Hanabusa v. Lingle, 105 Haw. 28, 93 P.3d 670 (2004).
Ind.—Zoeller v. Sweeney, 19 N.E.3d 749 (Ind. 2014).
N.D.—In re Disciplinary Action Against McGuire, 2004 ND 171, 685 N.W.2d 748 (N.D. 2004).
Pa.—In re Bruno, 101 A.3d 635 (Pa. 2014).
Language susceptible to more than one interpretation
When the language of a constitutional provision is susceptible to more than one interpretation, courts consider other related provisions of the constitution as well as sources beyond the instrument itself to ascertain its intent and purpose.

N.J.—Cambria v. Soaries, 169 N.J. 1, 776 A.2d 754 (2001).

4 Ark.—Richardson v. Martin, 2014 Ark. 429, 444 S.W.3d 855 (2014).

Colo.—Town of Frisco v. Baum, 90 P.3d 845 (Colo. 2004).

5 Alaska—State v. Schmidt, 323 P.3d 647 (Alaska 2014).

Ariz.—State ex rel. Montgomery v. Mathis, 231 Ariz. 103, 290 P.3d 1226 (Ct. App. Div. 1 2012).

Colo.—People v. Fioco, 2014 COA 22, 342 P.3d 530 (Colo. App. 2014), cert. denied, 2015 WL 339312 (Colo. 2015).

Ky.—Legislative Research Com'n v. Fischer, 366 S.W.3d 905 (Ky. 2012).

Okla.—City of Guymon v. Butler, 2004 OK 37, 92 P.3d 80 (Okla. 2004).

S.D.—In re Certification of a Question of Law from U.S. Dist. Court, Dist. of South Dakota, Western Div., 2000 SD 97, 615 N.W.2d 590 (S.D. 2000).

Ensuring will of the majority expressed

When constitutional amendments seemingly conflict, the court must harmonize both to assure that the constitution is a consistent, workable whole; this approach ensures that the submission of one or the other amendment was not a pointless act and that the will of the majority as expressed in free elections prevails.

Ariz.—Hughes v. Martin, 203 Ariz. 165, 52 P.3d 197 (2002).

Clauses held not coterminous

The Import-Export Clause and Commerce Clause of the Federal Constitution, though related, are not coextensive, and the limitations of one cannot be read into the other.

U.S.—Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 67 S. Ct. 156, 91 L. Ed. 80 (1946).

6 Colo.—Town of Frisco v. Baum, 90 P.3d 845 (Colo. 2004).

N.D.—Kelsh v. Jaeger, 2002 ND 53, 641 N.W.2d 100 (N.D. 2002).

Okla.—City of Guymon v. Butler, 2004 OK 37, 92 P.3d 80 (Okla. 2004).

S.D.—In re Certification of a Question of Law from U.S. Dist. Court, Dist. of South Dakota, Western Div., 2000 SD 97, 615 N.W.2d 590 (S.D. 2000).

Tex.—Bell v. Low Income Women of Texas, 95 S.W.3d 253 (Tex. 2002).

Wash.—Washington County Bd. of Equalization v. Petron Development Co., 109 P.3d 146 (Colo. 2005).

7 Wyo.—Powers v. State, 2014 WY 15, 318 P.3d 300, 301 Ed. Law Rep. 1029 (Wyo. 2014).

8 Ind.—Zoeller v. Sweeney, 19 N.E.3d 749 (Ind. 2014).

Or.—State v. Sagdal, 356 Or. 639, 343 P.3d 226 (2015).

9 Ind.—Zoeller v. Sweeney, 19 N.E.3d 749 (Ind. 2014).

10 Tex.—Doody v. Ameriquest Mort. Co., 49 S.W.3d 342 (Tex. 2001).

Determined together

Every provision of a constitution dealing with the same subject matter must be considered in determining the meaning of any expression whose meaning is in doubt.

Mont.—Powder River County v. State, 2002 MT 259, 312 Mont. 198, 60 P.3d 357 (2002).

11 Fla.—Physicians Healthcare Plans, Inc. v. Pfeifler, 846 So. 2d 1129 (Fla. 2003).

N.C.—Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377 (2002).

S.D.—State v. Wilson, 2000 SD 133, 618 N.W.2d 513 (S.D. 2000).

Wyo.—Cathcart v. Meyer, 2004 WY 49, 88 P.3d 1050 (Wyo. 2004).

Ensures consistent and logical meaning that gives effect to each provision

Fla.—Caribbean Conservation Corp., Inc. v. Florida Fish and Wildlife Conservation Com'n, 838 So. 2d 492 (Fla. 2003).

12 Fla.—In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session, 263 So. 2d 797 (Fla. 1972), opinion supplemented on other grounds, 279 So. 2d 14 (Fla. 1973) and opinion supplemented on other grounds, 281 So. 2d 484 (Fla. 1973).

13 Mo.—Boone County Court v. State, 631 S.W.2d 321 (Mo. 1982).

14 Mont.—Powder River County v. State, 2002 MT 259, 312 Mont. 198, 60 P.3d 357 (2002).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

4. Instrument Construed as a Whole

§ 98. Construing constitution as a whole, generally—Bills of rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 596 to 602

The bills of rights inserted in the federal and state American constitutions are regarded as parts of the constitutions in which they are recited and are to be construed with other constitutional provisions.

The bills of rights inserted in the American constitutions are regarded as parts of the constitutions in which they are recited and are to be construed with other constitutional provisions.[1] In view of their origin and long use, they cannot be regarded as introducing new matters or prescribing new conditions; their purpose is to preserve ancient principles rather than to establish modern principles.[2]

Although a declaration of rights has been held to be equally effective wherever its position appears in a constitution,[3] and, in case of conflict, is controlling,[4] there is authority to the effect that a bill of rights, being a declaration of general principles of government, is limited and qualified by other parts of the constitution when they differ.[5]

Footnotes

1 U.S.—Field Packing Co. v. Glenn, 5 F. Supp. 4 (W.D. Ky. 1933), modified on other grounds, 290 U.S. 177, 54 S. Ct. 138, 78 L. Ed. 252 (1933).
Md.—Slansky v. State, 192 Md. 94, 63 A.2d 599 (1949).
Fourteenth Amendment
The Bill of Rights is consulted for guidance in resolving conflicting claims concerning the meaning of the language in the Fourteenth Amendment denying states the power to "deprive any person of life, liberty, or property, without due process of law."
U.S.—Duncan v. State of La., 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

2 Nev.—Riter v. Douglass, 32 Nev. 400, 109 P. 444 (1910).

3 Or.—Ex parte Kerby, 103 Or. 612, 205 P. 279, 36 A.L.R. 1451 (1922).

4 Ala.—In re Dorsey, 7 Port. 293, 1838 WL 679 (Ala. 1838).

5 Md.—Mayor & City Council of Baltimore ex rel. Bd. of Police of City of Baltimore, 15 Md. 376, 1860 WL 3363 (1860).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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A. Construction

4. Instrument Construed as a Whole

§ 99. Presumption against superfluity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 596 to 602

All constitutional provisions have equal dignity, and the presumption and legal intendment is that every clause in a written constitution has been inserted for some useful purpose.

All constitutional provisions have equal dignity,[1] and each subsection, sentence, and clause of a constitution must be read in light of the others to form a congruous whole so as not to render any language superfluous.[2] The presumption and legal intendment is that every clause in a written constitution has been inserted for some useful purpose,[3] and courts should avoid a construction which would render any portion of the constitution meaningless,[4] idle,[5] inoperative,[6] needless,[7] or nugatory.[8]

No provision should be construed to nullify or impair another.[9] Accordingly, one clause of a constitution will not be allowed to defeat another if the two can be made to stand together through some reasonable construction.[10]

Footnotes

1 U.S.—Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979).

One article or section is entitled to same weight as any other article or section

Ill.—People v. Richardson, 196 Ill. 2d 225, 256 Ill. Dec. 267, 751 N.E.2d 1104 (2001).

Federal Constitution

(1) The Federal Constitution is not to be construed as destroying itself, but its principles are of equal dignity, and none must be so enforced as to nullify or substantially impair the other.

Ky.—Reuben H. Donnelley Corp. v. City of Bellevue, 283 Ky. 152, 140 S.W.2d 1024 (1940).

(2) Each provision of Federal Constitution is interdependent upon all other provisions.

Fla.—State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So. 2d 904 (Fla. 1976).

2 Fla.—Ford v. Browning, 992 So. 2d 132 (Fla. 2008).

3 Minn.—Butler Taconite v. Roemer, 282 N.W.2d 867 (Minn. 1979).

Neb.—State ex rel. Loontjer v. Gale, 288 Neb. 973, 853 N.W.2d 494 (2014).

S.C.—Ravenel v. Dekle, 265 S.C. 364, 218 S.E.2d 521 (1975).

4 Neb.—Hall v. Progress Pig, Inc., 259 Neb. 407, 610 N.W.2d 420 (2000).

Tex.—Bank of New York Mellon v. Daryapayma, 2015 WL 708620 (Tex. App. Dallas 2015).

Wyo.—Geringer v. Bebout, 10 P.3d 514 (Wyo. 2000).

No text superfluous

Related clauses of a constitution should be interpreted to avoid contradictions in text or the rendering of some part of the text superfluous.

U.S.—Florida Sugar Marketing and Terminal Ass'n, Inc. v. U.S., 220 F.3d 1331 (Fed. Cir. 2000).

5 Tex.—Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578 (Tex. 2000).

6 Tex.—Bank of New York Mellon v. Daryapayma, 2015 WL 708620 (Tex. App. Dallas 2015).

Wyo.—Geringer v. Bebout, 10 P.3d 514 (Wyo. 2000).

7 R.I.—Woonsocket School Committee v. Chafee, 89 A.3d 778, 303 Ed. Law Rep. 924 (R.I. 2014).

8 Md.—Bienkowski v. Brooks, 386 Md. 516, 873 A.2d 1122 (2005).

Tex.—Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578 (Tex. 2000).

9 Mich.—Mayor of Cadillac v. Blackburn, 306 Mich. App. 512, 857 N.W.2d 529 (2014).

Tenn.—Estate of Bell v. Shelby County Health Care Corp., 318 S.W.3d 823 (Tenn. 2010).

10 Ill.—People v. Richardson, 196 Ill. 2d 225, 256 Ill. Dec. 267, 751 N.E.2d 1104 (2001).

La.—East Baton Rouge Parish School Bd. v. Foster, 851 So. 2d 985, 180 Ed. Law Rep. 356 (La. 2003).

Provisions adopted on same day

The guiding principle of constitutional construction is that, if amendments are adopted on the same day, they must be construed together and effect given to all; any differences must be reconciled if such is possible.

Ariz.—Hughes v. Martin, 203 Ariz. 165, 52 P.3d 197 (2002).

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A. Construction

4. Instrument Construed as a Whole

§ 100. Conflicting provisions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 596 to 602

In construing a constitution, distinct provisions are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict.

A court must reconcile provisions that appear to conflict.[1] Only when an irreconcilable conflict is presented will the court resort to methods of statutory or constitutional interpretation that would have one provision prevail over another.[2] In construing a constitution, distinct provisions are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict.[3]

When a court is faced with conflicting policies arising out of multiple constitutional provisions in a specific factual situation, it must strike a balance between the provisions if possible.[4] If a balance cannot be struck, however, the lesser legal right will yield.[5]

Footnotes

1 Ill.—People v. Richardson, 196 Ill. 2d 225, 256 Ill. Dec. 267, 751 N.E.2d 1104 (2001).
Mo.—Thompson v. Hunter, 119 S.W.3d 95, 182 Ed. Law Rep. 986 (Mo. 2003).
N.D.—Kelsh v. Jaeger, 2002 ND 53, 641 N.W.2d 100 (N.D. 2002).

2 Idaho—State v. Straub, 153 Idaho 882, 292 P.3d 273 (2013).

3 Fla.—Wilson v. Crews, 160 Fla. 169, 34 So. 2d 114 (1948).
La.—Meyers v. Flournoy, 209 La. 812, 25 So. 2d 601 (1946).
Mutually exclusive provisions
If two constitutional amendments adopted on same day and going into effect at same time are mutually exclusive of each other, both amendments must fall as it is impossible to know, and effectuate, the electors' final will.
R.I.—Opinion to the Governor, 78 R.I. 144, 80 A.2d 165 (1951).

4 Nev.—Guinn v. Legislature of State of Nev., 119 Nev. 460, 76 P.3d 22 (2003).
Issues and interests considered
A potential conflict between the Twenty-First Amendment and other portions of the Federal Constitution is resolved by considering the provisions in light of each other and in the context of the issues and interests at stake in the concrete case.
Cal.—Business Title Corp. v. Division of Labor Law Enforcement, 17 Cal. 3d 878, 132 Cal. Rptr. 454, 553 P.2d 614 (1976).

5 Minn.—Enger v. Holm, 213 Minn. 154, 6 N.W.2d 101 (1942).
R.I.—Opinion to the Governor, 78 R.I. 144, 80 A.2d 165 (1951).
Va.—Skyline Swannanoa v. Nelson County, 186 Va. 878, 44 S.E.2d 437 (1947).

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A. Construction

4. Instrument Construed as a Whole

§ 101. General and special provisions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 583, 585 to 589, 596 to 602, 1067

If one constitutional provision addresses a subject in general terms, and another addresses the same subject with more detail, the two provisions should be harmonized if possible, but if there is any conflict, the special provision will prevail.

If one constitutional provision addresses a subject in general terms, and another addresses the same subject with more detail, the two provisions should be harmonized if possible,[1] but if there is any conflict, the specific provision will prevail.[2] Accordingly, to the extent that two constitutional provisions overlap or conflict, specific provisions control over general provisions.[3] When general and special provisions of a constitution are in conflict, the special provisions should be given effect to the extent of their scope,[4] leaving the general provisions to control in instances where the special provisions do not apply.[5] Thus, if a specific statute conflicts with a general constitutional provision, the latter governs, and the same is true where a specific state statute conflicts with a general federal statute.[6]

If specific and general provisions conflict,[7] or a particular intent is incompatible with a general intent,[8] the specific provision or particular intent will be treated as an exception and should receive a strict, though reasonable, construction.[9] The courts will neither curtail a general rule nor add to an exception by implication.[10]

Reference and purpose of proviso.

A proviso in a constitution usually refers to the clause or portion of the instrument immediately preceding it.[11] Its function is not to enlarge or extend the section of the constitution of which it is a part but to restrict the sense, or clarify the meaning, of the preceding language.[12] A proviso is accordingly to be construed strictly and limited to objects that are fairly within it terms.[13]

Footnotes

1 La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).

2 La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).
Ariz.—Clouse ex rel. Clouse v. State, 199 Ariz. 196, 16 P.3d 757 (2001).

3 U.S.—Nitro-Lift Technologies, L.L.C. v. Howard, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012).
Ill.—People v. Richardson, 196 Ill. 2d 225, 256 Ill. Dec. 267, 751 N.E.2d 1104 (2001).
Miss.—Harrison v. State, 800 So. 2d 1134 (Miss. 2001).

4 Colo.—de'Sha v. Reed, 194 Colo. 367, 572 P.2d 821 (1977).
Ill.—Walker v. State Bd. of Elections, 65 Ill. 2d 543, 3 Ill. Dec. 703, 359 N.E.2d 113 (1976).
Mich.—Advisory Opinion on Constitutionality of 1978 PA 426, 403 Mich. 631, 272 N.W.2d 495 (1978).
Mont.—Jones v. Judge, 176 Mont. 251, 577 P.2d 846 (1978).
N.M.—City of Albuquerque v. New Mexico State Corp. Commission, 1979-NMSC-095, 93 N.M. 719, 605 P.2d 227 (1979).

5 Colo.—Kadan v. Board of Sup'rs of Elections of Baltimore County, 273 Md. 406, 329 A.2d 702 (1974).
Mich.—Advisory Opinion on Constitutionality of 1978 PA 426, 403 Mich. 631, 272 N.W.2d 495 (1978).

6 U.S.—Nitro-Lift Technologies, L.L.C. v. Howard, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012).

7 U.S.—Nitro-Lift Technologies, L.L.C. v. Howard, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012); City of Tulsa v. Southwestern Bell Telephone Co., 75 F.2d 343 (C.C.A. 10th Cir. 1935).

8 Colo.—People v. Field, 66 Colo. 367, 181 P. 526 (1919).
Ill.—People ex rel. Nauert v. Smith, 327 Ill. 11, 158 N.E. 418 (1927).

9 Ohio—State ex rel. Keller v. Forney, 108 Ohio St. 463, 1 Ohio L. Abs. 698, 141 N.E. 16 (1923).

10 Tenn.—Evans v. McCabe, 164 Tenn. 672, 52 S.W.2d 617 (1932).

11 Nev.—State ex rel. Miller v. Lani, 55 Nev. 123, 27 P.2d 537 (1933).

12 Fla.—In re Advisory Opinion to Governor, 313 So. 2d 717 (Fla. 1975).
Ind.—Kirkpatrick v. King, 228 Ind. 236, 91 N.E.2d 785 (1950).

13 U.S.—Wirtz v. Phillips, 251 F. Supp. 789 (W.D. Pa. 1965).
Fla.—In re Advisory Opinion to Governor, 313 So. 2d 717 (Fla. 1975).

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A. Construction

4. Instrument Construed as a Whole

§ 102. Earlier and later provisions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 596 to 602, 614, 615, 617, 630 to 633

If conflicting provisions in a constitution cannot be harmonized, the last in order of time and local position will be preferred.

If two provisions of a constitution are irreconcilably repugnant, the last in order of time and local position will be preferred.[1] It has been held, however, that this rule should be applied only as a last resort[2] and only when it is impossible to harmonize the provisions by any reasonable construction that will permit them to stand consistently together.[3]

Amendments.

An amendment to a constitutional provision that has been judicially interpreted is presumed to change existing law.[4] Whether a particular constitutional provision has been amended may give a construing court guidance about the intended meaning of an ambiguous provision.[5]

Footnotes

1 Ariz.—Williams v. Magma Copper Co., 5 Ariz. App. 236, 425 P.2d 138 (1967).
Cal.—Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187 (1971).
Mich.—Advisory Opinion on Constitutionality of 1978 PA 426, 403 Mich. 631, 272 N.W.2d 495 (1978).

2 Tex.—Farrar v. Board of Trustees of Emp. Retirement System of Tex., 150 Tex. 572, 243 S.W.2d 688 (1951).

3 Idaho—Engelking v. Investment Bd., 93 Idaho 217, 458 P.2d 213 (1969).
Tex.—Ramirez v. Flores, 505 S.W.2d 406 (Tex. Civ. App. San Antonio 1973), writ refused n.r.e., (June 5, 1974).

4 Okla.—Calvey v. Daxon, 2000 OK 17, 997 P.2d 164 (Okla. 2000).

5 R.I.—Mosby v. Devine, 851 A.2d 1031 (R.I. 2004).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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A. Construction

5. Extrinsic Aids to Construction

§ 103. Extrinsic aids to construction, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 603 to 606, 613

When a constitution is ambiguous, extrinsic matters may be considered in construing it.

It is neither necessary nor permissible to resort to extrinsic matters for the construction of unambiguous provisions of a constitution.[1] Thus, if the language of a constitutional provision is clear and unambiguous, no extrinsic matter may be shown to support a construction that would vary the apparent meaning of the text.[2] On the other hand, if the meaning of some provision of a constitution is doubtful and not to be explained by comparison with other parts of the instrument, courts are at liberty to look beyond the instrument itself for aid in determining its meaning.[3] When the court is justified in calling extrinsic facts or considerations to its aid in construing constitutional provisions, the object is to ascertain the reason that induced the framers to enact the provision in dispute and the purpose sought to be accomplished, in order to construe the whole instrument in a way that will effectuate that purpose.[4] The court examines three primary sources in determining the meaning of a constitutional provision: its plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature as manifested through the first legislative action following its adoption.[5] Furthermore, if a state constitutional provision is ambiguous, a court construing the provision should focus primarily on factors that inhere in the State's unique

experience.[6] These extrinsic factors include (1) the express language of the constitutional provision; (2) the provision's formative history; (3) both preexisting and developing state law; (4) evolving customs, traditions, and attitudes within the state; (5) the state's own general history; and (6) Any external influences that may have shaped state law.[7]

Although supplementary materials may illuminate ambiguous terms in a constitutional provision, they cannot direct an interpretation that is contrary to the one plainly expressed in the text.[8] Furthermore, since external aids are of uncertain value, they should be made use of with hesitation and circumspection,[9] and immaterial matters should not be considered.[10]

CUMULATIVE SUPPLEMENT

Cases:

Long settled and established practice may have great weight in a proper interpretation of constitutional provisions. Chiafalo v. Washington, 140 S. Ct. 2316 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Cal.—Greene v. Marin County Flood Control and Water Conservation Dist., 49 Cal. 4th 277, 109 Cal. Rptr. 3d 620, 231 P.3d 350 (2010).
Haw.—State ex rel. Anzai v. City and County of Honolulu, 99 Haw. 508, 57 P.3d 433 (2002).
Mich.—American Axle & Mfg., Inc. v. City of Hamtramck, 461 Mich. 352, 604 N.W.2d 330 (2000).
Minn.—Schowalter v. State, 822 N.W.2d 292 (Minn. 2012).
Neb.—State ex rel. Stenberg v. Omaha Exposition and Racing, Inc., 263 Neb. 991, 644 N.W.2d 563 (2002).

2 Ariz.—Parker v. City of Tucson, 233 Ariz. 422, 314 P.3d 100 (Ct. App. Div. 2 2013), review denied, (Apr. 22, 2014).
Cal.—Greene v. Marin County Flood Control and Water Conservation Dist., 49 Cal. 4th 277, 109 Cal. Rptr. 3d 620, 231 P.3d 350 (2010).
Neb.—State ex rel. Stenberg v. Omaha Exposition and Racing, Inc., 263 Neb. 991, 644 N.W.2d 563 (2002).

3 Cal.—Thompson v. Department of Corrections, 25 Cal. 4th 117, 105 Cal. Rptr. 2d 46, 18 P.3d 1198 (2001).
Haw.—State ex rel. Anzai v. City and County of Honolulu, 99 Haw. 508, 57 P.3d 433 (2002).
Minn.—State v. Brooks, 604 N.W.2d 345 (Minn. 2000), as modified, (Mar. 15, 2000).
N.J—McNeil v. Legislative Apportionment Com'n of State, 177 N.J. 364, 828 A.2d 840 (2003).
Related constitutional provisions
If the language of a constitutional prohibition makes its aim evident and unequivocal, courts need not consider the historical basis for the prohibition and may not—by separately considering related constitutional provisions—arrive at a construction that detracts from the effectiveness or manifest meaning and purpose of the related provisions.
La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).
Existing statutory framework
In interpreting voter-initiated constitutional provisions, a court considers any relevant statutory framework in effect at the time that the voters adopted the provision.
Or.—Li v. State, 338 Or. 376, 110 P.3d 91 (2005).

4 Md.—Miles v. State, 435 Md. 540, 80 A.3d 242 (2013).

5 Wis.—Appling v. Walker, 2014 WI 96, 358 Wis. 2d 132, 853 N.W.2d 888 (2014).

6 U.S.—American Ass'n of People With Disabilities v. Smith, 227 F. Supp. 2d 1276 (M.D. Fla. 2002).

7 U.S.—American Ass'n of People With Disabilities v. Smith, 227 F. Supp. 2d 1276 (M.D. Fla. 2002).

8 Okla.—State v. Bezdicek, 2002 OK CR 28, 53 P.3d 917 (Okla. Crim. App. 2002).

9 Ind.—Morgan v. Schornick, 207 Ind. 225, 191 N.E. 141 (1934).

Mo.—State ex rel. Donnell v. Osburn, 347 Mo. 469, 147 S.W.2d 1065, 136 A.L.R. 667 (1941).

10 U.S.—Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

5. Extrinsic Aids to Construction

§ 104. Reference to common law

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 603 to 606, 613

A constitution is to be construed in the light of the common law, and the definition or meaning of its terms is generally ascertained by a reference to the common law meaning unless a different intention appears.

A constitution is to be construed in the light of the common law,[1] and the definition or meaning of its terms is generally ascertained by a reference to the common law meaning[2] unless a different intention appears.[3] In determining the scope of a right that is embodied in a state constitution, reference is made to common law practice as it existed at the time the constitution was adopted.[4] The framers of the instrument are presumed to have intended no change or innovation on the common law beyond what appears from an express declaration or reasonable implication.[5] With respect to the Federal Constitution at least, whether or not a particular clause is restricted by common law rules depends on the terms or nature of that clause.[6]

Footnotes

1 U.S.—Ex parte Grossman, 267 U.S. 87, 45 S. Ct. 332, 69 L. Ed. 527, 38 A.L.R. 131 (1925).
Okla.—State v. Bezdicek, 2002 OK CR 28, 53 P.3d 917 (Okla. Crim. App. 2002).

Scope and meaning of Seventh Amendment

U.S.—Glazer v. Glazer, 278 F. Supp. 476 (E.D. La. 1968).

2 Okla.—Public Service Co. of Okl. v. Caddo Elec. Co-op., 1970 OK 219, 479 P.2d 572 (Okla. 1970).
Tenn.—Dennis v. Sears, Roebuck & Co., 223 Tenn. 415, 446 S.W.2d 260 (1969).

3 U.S.—Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936).

4 R.I.—State v. Vaccaro, 121 R.I. 788, 403 A.2d 649 (1979).

5 N.Y.—Western New York Water Co. v. Brandt, 259 A.D. 11, 18 N.Y.S.2d 128 (3d Dep't 1940).
S.C.—State v. Rector, 158 S.C. 212, 155 S.E. 385 (1930) (overruled on other grounds by, Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005)).

6 U.S.—U.S. v. Wood, 299 U.S. 123, 57 S. Ct. 177, 81 L. Ed. 78 (1936); Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648, 55 S. Ct. 595, 79 L. Ed. 1110 (1935).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

5. Extrinsic Aids to Construction

§ 105. Circumstances attending formation of constitution

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 583, 585 to 589, 596, 603 to 606, 1067

In construing a doubtful constitutional provision, the court may consider the circumstances attending the formation of the constitution.

Constitutional provisions must be construed in light of the conditions that existed when they were adopted.[1] In construing a constitutional provision, a court often considers the circumstances surrounding the adoption of the provision and the purpose it is designed to accomplish.[2] When reviewing the history of the constitution and its amendments, the court must place itself as nearly as possible in the situation of the parties at the time the instrument was made, to gather their intention from the language used, as viewed in the light of the surrounding circumstances.[3] The examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification is a critical tool of constitutional interpretation.[4]

The court may consider the former law,[5] constitutional[6] or legislative history,[7] as well as the historical development of the particular provision under consideration.[8] It is always perilous, however, to derive the meaning of an adopted provision from

another provision that was deleted in the drafting process.[9] In interpreting an original provision of a constitution, a court considers the specific wording of the provision, the historical circumstances that led to its creation, and the case law surrounding it, and the purpose of this inquiry is to understand the wording in the light of the way that wording would have been understood and used by those who created the provision.[10] The historical context, however, should not override the plain meaning of the language.[11]

As a general proposition, reference to the debates at the constitutional convention for the interpretation of constitutional language is appropriate only if a court finds the provision at issue to be ambiguous.[12] According to some authorities, arguments submitted to the voters in support of a constitutional amendment at, or prior to, the time of the election by which it was adopted may be resorted to as an aid in construing an amendment[13] although these arguments are not controlling.[14] Unofficial publications —through which voters have been informed as to the meaning of various sections of a constitution—may be considered in ascertaining the voters' understanding of the meaning of doubtful constitutional provisions.[15] Other authorities, however, hold that such matter is not entitled to consideration as an aid to construction.[16] Moreover, the court may not consider the arguments against a proposed amendment put forward by a legislative minority.[17]

Footnotes

1 U.S.—In re Jay, 308 B.R. 251 (Bankr. N.D. Tex. 2003), subsequently rev'd on other grounds, 432 F.3d 323 (5th Cir. 2005) (stating Texas law).
Ga.—Gwinnett County School Dist. v. Cox, 289 Ga. 265, 710 S.E.2d 773, 268 Ed. Law Rep. 983 (2011).
Md.—Miles v. State, 435 Md. 540, 80 A.3d 242 (2013).
Mich.—WPW Acquisition Co. v. City of Troy, 466 Mich. 117, 643 N.W.2d 564 (2002).

2 Mich.—WPW Acquisition Co. v. City of Troy, 466 Mich. 117, 643 N.W.2d 564 (2002).

3 N.H.—New Hampshire Motor Transport Ass'n v. State, 150 N.H. 762, 846 A.2d 553 (2004).

4 U.S.—District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

5 Ala.—Standard Oil Co. v. State, 55 Ala. App. 103, 313 So. 2d 532 (Civ. App. 1975), writ denied, 294 Ala. 770, 313 So. 2d 540 (1975).
N.Y.—Bay Ridge Community Council v. Carey, 115 Misc. 2d 433, 454 N.Y.S.2d 186 (Sup 1982), judgment aff'd on other grounds, 103 A.D.2d 280, 479 N.Y.S.2d 746 (2d Dep't 1984), order aff'd, 66 N.Y.2d 657, 495 N.Y.S.2d 972, 486 N.E.2d 830 (1985).
N.C.—Sneed v. Greensboro City Bd. of Ed., 299 N.C. 609, 264 S.E.2d 106 (1980).
Historical development of law
An amendment must be viewed in light of the historical development of the decisional law that prevailed when it was adopted.
Fla.—Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).
Presumptions
Framers of the constitution are presumed to have knowledge of, and act on the basis of, the existing laws.
Ill.—Kanerva v. Weems, 2014 IL 115811, 383 Ill. Dec. 107, 13 N.E.3d 1228 (Ill. 2014).
Mich.—Waterford School Dist. v. State Bd. of Ed., 98 Mich. App. 658, 296 N.W.2d 328 (1980).

6 Iowa—Rants v. Vilsack, 684 N.W.2d 193 (Iowa 2004).

7 S.D.—State v. Wilson, 2000 SD 133, 618 N.W.2d 513 (S.D. 2000).
Tex.—Stringer v. Cendant Mortg. Corp., 23 S.W.3d 353 (Tex. 2000).
Wash.—Washington Off Highway Vehicle Alliance v. State, 176 Wash. 2d 225, 290 P.3d 954 (2012) (only if ambiguity presented).

8 Ariz.—McElhaney Cattle Co. v. Smith, 132 Ariz. 286, 645 P.2d 801 (1982).
Cal.—Cooperrider v. Civil Service Com., 97 Cal. App. 3d 495, 158 Cal. Rptr. 801 (1st Dist. 1979).
Fla.—In re Advisory Opinion to Governor Request of June 29, 1979, 374 So. 2d 959 (Fla. 1979).
Iowa—Redmond v. Ray, 268 N.W.2d 849 (Iowa 1978).

Md.—Andrews v. Governor of Maryland, 294 Md. 285, 449 A.2d 1144 (1982).
N.C.—Sneed v. Greensboro City Bd. of Ed., 299 N.C. 609, 264 S.E.2d 106 (1980).
Or.—Bobo v. Kulongoski, 338 Or. 111, 107 P.3d 18 (2005).
Utah—Jensen ex rel. Jensen v. Cunningham, 2011 UT 17, 250 P.3d 465 (Utah 2011).
Wash.—State v. Barton, 181 Wash. 2d 148, 331 P.3d 50 (2014).

History of events and proceedings contemporaneous with adoption

Wash.—Washington Water Jet Workers Ass'n v. Yarbrough, 151 Wash. 2d 470, 90 P.3d 42 (2004), as amended, (May 27, 2004).

Historical context

S.D.—Doe v. Nelson, 2004 SD 62, 680 N.W.2d 302 (S.D. 2004).

Gathering significance of provision

The significance of constitutional provisions is vital, not formal, and is to be gathered not simply by taking the words in the dictionary but by considering their origin and the line of their growth.

U.S.—Ullmann v. U.S., 350 U.S. 422, 76 S. Ct. 497, 100 L. Ed. 511, 53 A.L.R.2d 1008 (1956).

Remarks of individual legislator not relevant

Pa.—Zemprelli v. Thornburg, 47 Pa. Commw. 43, 407 A.2d 102 (1979).
Tenn.—Southern Ry. Co. v. Fowler, 497 S.W.2d 891 (Tenn. 1973).

Historical context of amendment

N.D.—Kelsh v. Jaeger, 2002 ND 53, 641 N.W.2d 100 (N.D. 2002).

9 U.S.—District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

10 Or.—State v. Amini, 331 Or. 384, 15 P.3d 541 (2000).

11 Mass.—Mazzone v. Attorney General, 432 Mass. 515, 736 N.E.2d 358 (2000).

12 Wyo.—Powers v. State, 2014 WY 15, 318 P.3d 300, 301 Ed. Law Rep. 1029 (Wyo. 2014).

13 Cal.—California Housing Finance Agency v. Patitucci, 22 Cal. 3d 171, 148 Cal. Rptr. 875, 583 P.2d 729 (1978).

Explanatory materials

(1) In construing constitutional provision, the court may examine explanatory materials that were available to people as a predicate for decision as persuasive of their intent.

Fla.—Plante v. Smathers, 372 So. 2d 933 (Fla. 1979).

(2) In examining the history of a constitutional amendment by initiative or referendum, courts consider relevant materials contained in the voters' pamphlet, such as the ballot title and the explanatory statement.

Or.—Flavorland Foods v. Washington County Assessor, 334 Or. 562, 54 P.3d 582 (2002).

(3) Election brochure arguments are properly considered as legislative history in construing constitutional amendments adopted by popular vote.

U.S.—Chico Feminist Women's Health Center v. Butte Glenn Medical Soc., 557 F. Supp. 1190 (E.D. Cal. 1983).

(4) Courts may determine the intent of the voters to a constitutional amendment by considering other relevant materials, such as the ballot title and submission clause and the biennial bluebook, which is the analysis of ballot proposals prepared by the legislature.

Colo.—Davidson v. Sandstrom, 83 P.3d 648 (Colo. 2004).

Commission chairperson's remarks

A statement of the former chairman of a constitution revision commission did not compel a certain interpretation of the provision, but it could be considered in the absence of evidence that the electorate might have had reason to understand the provision differently.

Cal.—Stanton v. Panish, 28 Cal. 3d 107, 167 Cal. Rptr. 584, 615 P.2d 1372 (1980).

14 Cal.—In re Quinn, 35 Cal. App. 3d 473, 110 Cal. Rptr. 881 (5th Dist. 1973) (disapproved of on other grounds by, State of California v. San Luis Obispo Sportsman's Assn., 22 Cal. 3d 440, 149 Cal. Rptr. 482, 584 P.2d 1088 (1978)).

Voters' pamphlet

Cal.—Miro v. Superior Court, 5 Cal. App. 3d 87, 84 Cal. Rptr. 874 (4th Dist. 1970).

Legislative council's interpretation

Although the intent of the drafters of a constitutional amendment is not relevant, the history of an amendment's drafting may nonetheless be relevant because the legislative council's interpretation, while not binding, provides important insight into the electorate's understanding of the amendment when it was passed.

Colo.—Davidson v. Sandstrom, 83 P.3d 648 (Colo. 2004).

15 Ill.—Client Follow-Up Co. v. Hynes, 75 Ill. 2d 208, 28 Ill. Dec. 488, 390 N.E.2d 847 (1979).

16 Mo.—St. Louis County v. State Highway Commission, 409 S.W.2d 149 (Mo. 1966).

17 Ill.—Hanley v. Kusper, 61 Ill. 2d 452, 337 N.E.2d 1 (1975).

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16 C.J.S. Constitutional Law § 106

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

5. Extrinsic Aids to Construction

§ 106. Circumstances attending formation of constitution—Purpose of enacting provision

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 583, 585 to 589, 596, 603 to 606, 1067

In construing a constitution, the court should keep in mind the object sought to be accomplished by its adoption and the evils or mischief, if any, sought to be prevented or remedied.

In construing a constitution, the court should keep in mind the object sought to be accomplished by its adoption[1] and the evils or mischief, if any, sought to be prevented or remedied.[2] Accordingly, the court may consider the general spirit of the times,[3] the history of the times,[4] or well-known usages, customs, or practices[5] though custom and convenience cannot contravene constitutional constraints.[6]

Footnotes

1 La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).
Mass.—Hancock v. Commissioner of Educ., 443 Mass. 428, 822 N.E.2d 1134, 195 Ed. Law Rep. 591 (2005).

2 La.—Ocean Energy, Inc. v. Plaquemines Parish Government, 880 So. 2d 1 (La. 2004).
Mass.—Hancock v. Commissioner of Educ., 443 Mass. 428, 822 N.E.2d 1134, 195 Ed. Law Rep. 591 (2005).
Md.—Moore v. State, 424 Md. 118, 34 A.3d 513 (2011).
Pa.—Robinson Tp., Washington County v. Com., 623 Pa. 564, 83 A.3d 901 (2013).

Constitutional amendments

(1) Constitutional amendments are adopted to make a change in the existing system, and a court is under the duty to consider the old law, the mischief, and the remedy and interpret the constitution broadly to accomplish the manifest purpose of the amendment.
S.D.—Doe v. Nelson, 2004 SD 62, 680 N.W.2d 302 (S.D. 2004).

(2) If the intent of the voters cannot be discerned from the language in the constitutional amendment, courts should construe the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment; courts may determine this by considering other relevant materials such as the ballot title and submission clause and the biennial bluebook, which is the analysis of ballot proposals prepared by the legislature.
Colo.—Davidson v. Sandstrom, 83 P.3d 648 (Colo. 2004).

3 Ala.—Standard Oil Co. v. State, 55 Ala. App. 103, 313 So. 2d 532 (Civ. App. 1975), writ denied, 294 Ala. 770, 313 So. 2d 540 (1975).
Haw.—State v. Kahlbaun, 64 Haw. 197, 638 P.2d 309 (1981).
Md.—Miles v. State, 435 Md. 540, 80 A.3d 242 (2013) (previous and contemporary history of the people).
Mich.—People v. Neumayer, 405 Mich. 341, 275 N.W.2d 230 (1979).

4 Haw.—Nelson v. Hawaiian Homes Com'n, 127 Haw. 185, 277 P.3d 279 (2012).
Ind.—City of Indianapolis v. Cox, 20 N.E.3d 201 (Ind. Ct. App. 2014).

5 Md.—Boyer v. Thurston, 247 Md. 279, 231 A.2d 50 (1967).
Neb.—Dwyer v. Omaha-Douglas Public Bldg. Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).
N.Y.—New York Public Interest Research Group, Inc. v. Steingut, 40 N.Y.2d 250, 386 N.Y.S.2d 646, 353 N.E.2d 558 (1976).
Tenn.—Cleveland Surgery Center, L.P. v. Bradley County Memorial Hosp., 30 S.W.3d 278 (Tenn. 2000).
Wis.—Wagner v. Milwaukee County Election Com'n, 2003 WI 103, 263 Wis. 2d 709, 666 N.W.2d 816 (2003).

Historical practice

Historical practice is relevant to what the constitution means by such concepts as trial by jury.
U.S.—U.S. v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

Prior practice not conclusive

Prior practice in interpreting and applying constitution is not conclusive as constitutions are necessarily framed in generalities and must be flexible enough to deal with new conditions and changing mores.
U.S.—Meyers By and Through Meyers v. Board of Educ. of San Juan School Dist., 905 F. Supp. 1544, 105 Ed. Law Rep. 453 (D. Utah 1995).

6 La.—Louisiana Federation of Teachers v. State, 118 So. 3d 1033, 296 Ed. Law Rep. 666 (La. 2013).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

5. Extrinsic Aids to Construction

§ 107. Circumstances attending formation of constitution—Application to initiative or referendum

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 583, 585 to 589, 596, 603 to 606, 1067

When interpreting a voter-initiated constitutional provision, a court considers the context of the provision, including other relevant constitutional provisions, its case law, and any relevant statutory framework in effect at the time when the voters adopted the provision.

The court interprets a constitutional amendment approved by a referendum to carry out the intent of the electorate that adopted it[1] and to give effect to the will of the people.[2] When interpreting a voter-initiated constitutional provision, a court considers the context of the provision, including other relevant constitutional provisions, its case law, and any relevant statutory framework in effect at the time when the voters adopted the provision.[3] Only those materials that were presented to the public at large help to elucidate the public's understanding of the measure and assist a court in its interpretation of the disputed initiated or referred constitutional provision, and those materials include items that are included in the voters' pamphlet, such as the ballot title, the explanatory statement, and the legislative argument in support.[4] When interpreting a state constitutional provision that was adopted by popular vote, the court will consider a delegate's statements in determining the meaning of the amendment

if the statements interpret the amendment's language in accordance with its plain and common meaning while reflecting its known purpose.[5]

Footnotes

1 Ariz.—Cave Creek Unified School Dist. v. Ducey, 233 Ariz. 1, 308 P.3d 1152, 297 Ed. Law Rep. 538 (2013).

2 Colo.—Beinor v. Industrial Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011).

3 Or.—Li v. State, 338 Or. 376, 110 P.3d 91 (2005).

4 Or.—Shilo Inn v. Multnomah County, 333 Or. 101, 36 P.3d 954 (2001), opinion modified on other grounds on reconsideration, 334 Or. 11, 45 P.3d 107 (2002).

Indication of intent to apply retroactively

(1) When an initiative measure is at issue, the most potentially informative extrinsic source in determining whether the voters intended a retroactive application is usually the material contained in the ballot pamphlet that is mailed to each voter.

Cal.—Strauss v. Horton, 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (2009), as modified, (June 17, 2009).

(2) A voter-approved legislative referendum amending the constitutional provision addressing the qualifications for members of the Judicial Nominating Commission did not apply retroactively to commission members who were appointed before the amendment as no language in either the ballot title or the amendment indicated such an intent.

Okla.—Fent v. Henry, 2011 OK 10, 257 P.3d 984 (Okla. 2011), as corrected, (Feb. 15, 2011).

5 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

5. Extrinsic Aids to Construction

§ 108. Proceedings of constitutional convention

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 603 to 606

In order to ascertain the meaning of a doubtful provision of a constitution, the proceedings and debates of a constitutional convention may be examined although it may be of less importance than other guides.

In ascertaining the meaning and purpose of a doubtful constitutional provision, the proceedings of the convention that framed the constitution are valuable aids[1] as are the convention debates.[2] Accordingly, a court may consult a constitutional revision commission's official reports to determine the intent and objective of ambiguous constitutional provisions.[3] Similarly, the record of the debates during a state constitutional convention may properly be resorted to as some indication of the intent and object that caused the incorporation of the disputed clauses into the fundamental law.[4] The court considers statements by a delegate to a state constitutional convention in determining the meaning of an amendment if those statements interpret the amendment's language in accordance with its plain and common meaning while reflecting its known purpose or object.[5]

However, proceedings of constitutional conventions are not controlling,[6] and their persuasive effect depends upon the circumstances of each case.[7] Ultimately, it is the final product—the constitution actually submitted to the people for adoption,

as they understood it—that is controlling.[8] Generally, the proceedings of a legislature are regarded as more conclusive and more satisfactory as a source of information than those of a convention.[9]

Footnotes

1 Pa.—Pennsylvania State Ass'n of County Com'rs v. Com., 617 Pa. 231, 52 A.3d 1213 (2012).
R.I.—Woonsocket School Committee v. Chafee, 89 A.3d 778, 303 Ed. Law Rep. 924 (R.I. 2014).
Tenn.—Hooker v. Haslam, 437 S.W.3d 409 (Tenn. 2014).
"Address to the People"
The Address to the People, widely distributed to the public prior to the ratification vote in order to explain the import of the sundry proposals, is a valuable tool in determining whether a possible common understanding diverges from the plain meaning of the actual words of the state constitution.
Mich.—In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 490 Mich. 295, 806 N.W.2d 683 (2011).

2 Mich.—AFSCME Council 25 v. State Employees' Retirement System, 294 Mich. App. 1, 818 N.W.2d 337 (2011).
Wis.—Schilling v. State Crime Victims Rights Bd., 2005 WI 17, 278 Wis. 2d 216, 692 N.W.2d 623 (2005).
Wyo.—Powers v. State, 2014 WY 15, 318 P.3d 300, 301 Ed. Law Rep. 1029 (Wyo. 2014).

3 Cal.—Leone v. Medical Bd. of Cal., 22 Cal. 4th 660, 94 Cal. Rptr. 2d 61, 995 P.2d 191 (2000).

4 Wis.—Director of Office of State Lands & Investments v. Merbanco, Inc., 2003 WY 73, 70 P.3d 241, 177 Ed. Law Rep. 558 (Wyo. 2003).

5 N.H.—In re Southern New Hampshire Medical Center, 164 N.H. 319, 55 A.3d 988 (2012).

6 Haw.—State v. Kahlbaun, 64 Haw. 197, 638 P.2d 309 (1981).
Mich.—AFSCME Council 25 v. State Employees' Retirement System, 294 Mich. App. 1, 818 N.W.2d 337 (2011).
Mo.—Metal Form Corp. v. Leachman, 599 S.W.2d 922 (Mo. 1980).
Mont.—Keller v. Smith, 170 Mont. 399, 553 P.2d 1002 (1976).
Committee meetings
Committee minutes are not conclusive on the intent behind, or interpretation of, the state constitution.
S.C.—State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001).

7 Haw.—State v. Kahlbaun, 64 Haw. 197, 638 P.2d 309 (1981).
Mo.—Metal Form Corp. v. Leachman, 599 S.W.2d 922 (Mo. 1980).

8 Ill.—People ex rel. Cosentino v. Adams County, 82 Ill. 2d 565, 46 Ill. Dec. 116, 413 N.E.2d 870 (1980).

9 Del.—State ex rel. Walker v. Harrington, 42 Del. 14, 27 A.2d 67 (1942).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

5. Extrinsic Aids to Construction

§ 109. Legislative, executive, and practical construction

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 607 to 612, 614

The court, in determining the meaning of an ambiguous constitutional provision, may consider the contemporaneous and practical construction given it by those whose duty it has been to construe, execute, and apply it.

In determining the meaning of an ambiguous constitutional provision, the courts may properly seek extrinsic aid by ascertaining the construction given such provision, at the time of its adoption and since, by those whose duty it has been to construe, execute, and apply it in practice.[1] When interpreting constitutional provisions, courts accord great weight to contemporaneous construction and practical interpretations by the various departments of the government.[2] More specifically, as a general rule, in determining the meaning of an ambiguous constitutional provision, courts will heavily weight a contemporaneous[3] legislative construction[4] as these interpretations are a safe guide to the constitution's proper interpretation[5] and create a strong presumption that the interpretation was proper.[6]

The earliest interpretation of a constitutional provision by the legislature as manifested in the first law passed following adoption will typically be examined to determine the provision's meaning.[7] Thus, early legislative enactments provide contemporaneous

and weighty evidence of the constitution's meaning.[8] Furthermore, contemporaneous legislative exposition of a constitution, acquiesced in for a long term of years, fixes the construction to be given its provisions.[9]

Although a legislature's construction of a constitutional provision is advisory, and not binding,[10] and the judiciary is the final arbiter of what a constitution provides,[11] the court would be loath to interpret the constitution otherwise.[12]

Courts, however, do not owe deference to the executive branch's interpretation of a constitution.[13] The deference that an appellate court gives administrative agencies on questions of statutory interpretation does not extend to constitutional issues.[14]

CUMULATIVE SUPPLEMENT

Cases:

The federal Judiciary does not owe deference to the Executive Branch's interpretation of the Constitution. Trump v. Vance, 941 F.3d 631 (2d Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Ray v. Blair, 343 U.S. 214, 72 S. Ct. 654, 96 L. Ed. 894 (1952).
Ala.—Standard Oil Co. v. State, 55 Ala. App. 103, 313 So. 2d 532 (Civ. App. 1975), writ denied, 294 Ala. 770, 313 So. 2d 540 (1975).
Cal.—Mosk v. Superior Court, 25 Cal. 3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979).
Haw.—State v. Kahlbaun, 64 Haw. 197, 638 P.2d 309 (1981).
N.Y.—New York Public Interest Research Group, Inc. v. Steingut, 40 N.Y.2d 250, 386 N.Y.S.2d 646, 353 N.E.2d 558 (1976).
Okla.—Wiseman v. Boren, 1976 OK 2, 545 P.2d 753 (Okla. 1976).
Or.—State ex rel. Oregonian Pub. Co. v. Deiz, 289 Or. 277, 613 P.2d 23 (1980).
Substitution-of-judgment test
A court applies the "substitution-of-judgment test" to a borough tax assessor's interpretations of a state constitution, statutes, and case law but without deferring to the assessor's administrative expertise.
Alaska—Fairbanks North Star Borough v. Dena Nena Henash, 88 P.3d 124 (Alaska 2004).

2 N.J.—McNeil v. Legislative Apportionment Com'n of State, 177 N.J. 364, 828 A.2d 840 (2003).
W. Va.—State ex rel. McGraw v. Burton, 212 W. Va. 23, 569 S.E.2d 99 (2002).

3 Iowa—Rudd v. Ray, 248 N.W.2d 125 (Iowa 1976).
Tex.—Moore v. Edna Hospital Dist., 449 S.W.2d 508 (Tex. Civ. App. Corpus Christi 1969), writ refused n.r.e., (May 20, 1970).
Wis.—Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

4 U.S.—Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942), order modified on other grounds, 63 S. Ct. 22 (1942); In re South Bay Expressway, L.P., 455 B.R. 732 (Bankr. S.D. Cal. 2011) (applying California law).
Cal.—Santa Catalina Island Conservancy v. County of Los Angeles, 126 Cal. App. 3d 221, 178 Cal. Rptr. 708 (2d Dist. 1981).
Fla.—Brown v. Firestone, 382 So. 2d 654 (Fla. 1980).
Haw.—State v. Kahlbaun, 64 Haw. 197, 638 P.2d 309 (1981).
Mo.—School Dist. of Kansas City v. State, 317 S.W.3d 599, 259 Ed. Law Rep. 930 (Mo. 2010).
Wyo.—Coronado Oil Co. v. Grieves, 603 P.2d 406 (Wyo. 1979).

5 N.M.—Block v. Vigil-Giron, 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72 (2004).

6 N.M.—Block v. Vigil-Giron, 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72 (2004).

Ballot title

If any ambiguity exists in constitutional provision, extrinsic materials such as the ballot title that presented the provision or any amendment to the people may be considered a contemporaneous construction of the provision itself.

Okla.—State v. Bezdicek, 2002 OK CR 28, 53 P.3d 917 (Okla. Crim. App. 2002).

Legislative definition of constitutional term

A legislative definition of a constitutional term must bear a reasonable and recognizable similarity to generally accepted definitions and the common understanding of the term by the people of the state.

Kan.—In re Cent. Illinois Public Services Co., 276 Kan. 612, 78 P.3d 419 (2003).

7 Wis.—Appling v. Walker, 2014 WI 96, 358 Wis. 2d 132, 853 N.W.2d 888 (2014).

8 U.S.—Printz v. U.S., 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997).

Wis.—Appling v. Walker, 2014 WI 96, 358 Wis. 2d 132, 853 N.W.2d 888 (2014).

First congress

Actions of the first congress are persuasive evidence of what the U.S. Constitution means.

U.S.—Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).

Early congress

Although actions of early congresses are imperfect indicators of constitution framers' intent, they provide some indication of views held by the framers, given the propinquity of congresses and the framing and presence of several framers in those congresses.

U.S.—Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994).

9 U.S.—Printz v. U.S., 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997).

10 Colo.—Board of County Com'rs v. Vail Associates, Inc., 19 P.3d 1263 (Colo. 2001), as modified on denial of reh'g, (Mar. 19, 2001).

Wyo.—Director of Office of State Lands & Investments v. Merbanco, Inc., 2003 WY 73, 70 P.3d 241, 177 Ed. Law Rep. 558 (Wyo. 2003).

11 Colo.—Board of County Com'rs v. Vail Associates, Inc., 19 P.3d 1263 (Colo. 2001), as modified on denial of reh'g, (Mar. 19, 2001).

12 Wyo.—Director of Office of State Lands & Investments v. Merbanco, Inc., 2003 WY 73, 70 P.3d 241, 177 Ed. Law Rep. 558 (Wyo. 2003).

13 U.S.—Public Citizen v. Burke, 843 F.2d 1473 (D.C. Cir. 1988); Mudd v. Caldera, 134 F. Supp. 2d 138 (D.D.C. 2001).

14 U.S.—Forbes v. Arkansas Educational Television Communication Network Foundation, 22 F.3d 1423 (8th Cir. 1994).

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§ 110. Judicial construction

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 607 to 612, 614

Questions arising under a constitution may be resolved by examining case law that interprets the specific provisions.

If a written constitution has been judicially construed, that construction, accepted and acquiesced in for many years, is as much a part of the instrument as if it had been written into it at its origin.[1] Thus, questions arising under a constitution may be resolved by examining case law that interprets the specific provisions.[2]

Footnotes

1 Ky.—Shamburger v. Duncan, 253 S.W.2d 388 (Ky. 1952).

2 Ind.—Jordan ex rel. Jordan v. Deery, 778 N.E.2d 1264 (Ind. 2002).
Mont.—Kottel v. State, 2002 MT 278, 312 Mont. 387, 60 P.3d 403 (2002).
Or.—State v. Cavan, 337 Or. 433, 98 P.3d 381 (2004).
Relevant cases from other jurisdictions

Pa.—Pap's A.M. v. City of Erie, 571 Pa. 375, 812 A.2d 591 (2002).

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§ 111. Provisions adopted from or related to other constitutions or statutes

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 614, 615, 617, 618, 633

If a constitutional provision is adopted that is similar or identical to that contained in a prior constitution or statute, or in the constitution of another jurisdiction, it is presumed that the provision was adopted with the construction previously placed on it.

If a constitutional provision has received a settled judicial construction, and is afterward incorporated into a new or revised constitution, it will be presumed to have been retained with a knowledge of the previous construction, and courts will feel bound to adhere to it.[1] The same rule applies to a constitutional amendment.[2] Prior legislative construction is, likewise, presumed to have been adopted by a later adoption of the provision so construed.[3] Thus, the language of an existing statute adopted into a constitution is presumed to be taken with its established construction.[4] However, if a provision in a new constitution relates to the same subject matter as a former provision that has been judicially construed, but the new provision is phrased in substantially different language or is qualified, it is presumed that the effect of the construction placed upon the former provision was intended to be avoided, and an omission in an amendment or reenactment of a constitution is presumed to have been intentional.[5]

Constitutions of other states.

When provisions have been adopted into the constitution of a state, which are identical with, or similar to, those of other states,[6] or those of statutes of other jurisdictions,[7] it will be presumed that the framers of such constitution were conversant with, and designed to adopt also, any construction previously placed on such provisions in such other jurisdictions. Accordingly, the decisions of the other state are persuasive in construing the provision in the courts of the adopting state.[8] The presumption, however, is not conclusive, and it will not be applied if the courts of the adopting state consider the construction of the other state erroneous[9] or unreasonable.[10] In determining whether a state system of educational funding violates the education provision of a state constitution, it is appropriate to consider sister-state interpretations of similar constitutional provisions although neither sister-state provisions nor interpretations of the Federal Constitution are directly applicable.[11]

CUMULATIVE SUPPLEMENT

Cases:

Statute exempting taxicab drivers from minimum wage requirements was repealed when minimum wage amendment to state constitution took effect, not when Supreme Court decided that the amendment impliedly repealed the statute; Supreme Court's function was to declare what the law was, not to create the law. Nev. Const. art. 15, § 16; Nev. Rev. St. § 608.250(2)(e). Nevada Yellow Cab Corporation v. Eighth Judicial District Court in and for County of Clark, 383 P.3d 246, 132 Nev. Adv. Op. No. 77 (Nev. 2016).

[END OF SUPPLEMENT]

Footnotes

1 Cal.—Sarracino v. Superior Court, 13 Cal. 3d 1, 118 Cal. Rptr. 21, 529 P.2d 53 (1974).
La.—Brasseaux v. Vermilion Parish Police Jury, 361 So. 2d 35 (La. Ct. App. 3d Cir. 1978), writ denied, 363 So. 2d 535 (La. 1978).
Mich.—Waterford School Dist. v. State Bd. of Ed., 98 Mich. App. 658, 296 N.W.2d 328 (1980).
S.C.—State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977).
Tenn.—Cumberland Capital Corp. v. Patty, 556 S.W.2d 516 (Tenn. 1977).

2 U.S.—Eisner v. Macomber, 252 U.S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570 (1920).
Ky.—Hodgkin v. Kentucky Chamber of Commerce, 246 S.W.2d 1014 (Ky. 1952).
Neb.—Ramsey v. Gage County, 153 Neb. 24, 43 N.W.2d 593 (1950).
Bill of Rights
Article 40 of the Maryland Declaration of Rights is coextensive with the First Amendment and is construed in pari materia with it.
U.S.—Kensington Volunteer Fire Dept., Inc. v. Montgomery County, Md., 684 F.3d 462 (4th Cir. 2012).

3 Colo.—Kingsley v. City & County of Denver, 126 Colo. 194, 247 P.2d 805 (1952).
Ga.—Thompson v. Talmadge, 201 Ga. 867, 41 S.E.2d 883 (1947).
Tex.—Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641 (1933).

4 Ariz.—Red Rover Copper Co. v. Industrial Commission, 58 Ariz. 203, 118 P.2d 1102, 137 A.L.R. 740 (1941).
Cal.—Sacramento County v. Hickman, 66 Cal. 2d 841, 59 Cal. Rptr. 609, 428 P.2d 593 (1967).
Ga.—Thompson v. Talmadge, 201 Ga. 867, 41 S.E.2d 883 (1947).
N.Y.—People v. Richter's Jewelers, Inc., 291 N.Y. 161, 51 N.E.2d 690, 150 A.L.R. 560 (1943).
Okla.—State ex rel. Kerr v. Grand River Dam Authority, 1945 OK 9, 195 Okla. 8, 154 P.2d 946 (1945).

Va.—City of Roanoke v. James W. Michael's Bakery Corp., 180 Va. 132, 21 S.E.2d 788 (1942).

5 Fla.—Swartz v. State, 316 So. 2d 618 (Fla. 1st DCA 1975).

6 Ariz.—Barrows v. Garvey, 67 Ariz. 202, 193 P.2d 913 (1948).
Idaho—Bishop v. Morrison-Knudsen Co., 64 Idaho 806, 137 P.2d 963 (1943).
Miss.—Mississippi School for Blind v. Armstrong, 216 Miss. 348, 62 So. 2d 369 (1953).
Okla.—Wimberly v. Deacon, 1943 OK 432, 195 Okla. 561, 144 P.2d 447 (1943).

7 Ariz.—Barrows v. Garvey, 67 Ariz. 202, 193 P.2d 913 (1948).
Idaho—Bishop v. Morrison-Knudsen Co., 64 Idaho 806, 137 P.2d 963 (1943).
Miss.—Bell v. Mississippi Orphans Home, 192 Miss. 205, 5 So. 2d 214 (1941).

8 Ariz.—Gulotta v. Triano, 125 Ariz. 144, 608 P.2d 81 (Ct. App. Div. 2 1980).
Ill.—Kraus v. Board of Trustees of Police Pension Fund of Village of Niles, 72 Ill. App. 3d 833, 28 Ill. Dec. 691, 390 N.E.2d 1281 (1st Dist. 1979).
N.D.—Cardiff v. Bismarck Public School Dist., 263 N.W.2d 105 (N.D. 1978).
Wash.—Biggs v. State, Dept. of Retirement Systems, 28 Wash. App. 257, 622 P.2d 1301 (Div. 2 1981).
Wis.—Bablitch and Bablitch v. Lincoln County, 82 Wis. 2d 574, 263 N.W.2d 218 (1978).

9 Iowa—State ex rel. Kuble v. Bisignano, 238 Iowa 1060, 28 N.W.2d 504 (1947).
Mo.—State ex rel. Pollock v. Becker, 289 Mo. 660, 233 S.W. 641 (1921).

10 Ariz.—Arizona Eastern R. Co. v. Hinton, 20 Ariz. 266, 179 P. 963 (1919).

11 Vt.—Brigham v. State, 166 Vt. 246, 692 A.2d 384, 117 Ed. Law Rep. 667 (1997).

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§ 112. Provisions adopted from or related to other constitutions or statutes—Federal Constitution, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 614, 615, 617, 618, 633

If a constitutional provision that is similar, or identical, to that contained in the Federal Constitution is adopted, it is presumed that the provision was adopted with the construction previously placed on it although the fact that a state constitutional provision is in pari materia with a federal one or has a federal counterpart does not mean that the provision will always be interpreted or applied in the same manner as its federal counterpart.

Although a state supreme court is the final arbiter of a state constitution, similar provisions of a state and federal constitutions are usually deemed to be identical in scope, import, and purpose.[1] If the state constitutional provision is similar to or has been adopted from a provision in the Federal Constitution, it is presumed that the framers of that constitution were aware of and intended to adopt the construction previously placed on the provision,[2] and the state provision should ordinarily receive the same interpretation as has been given to the federal provision.[3] Although the construction of similar federal provisions is persuasive authority,[4] it is not controlling.[5] Thus, when a party raises an issue involving parallel provisions of the state and federal constitutions, the courts generally reserve the right to develop an independent framework under the state constitution.[6]

A state constitution is a document of independent force, and the rights it guarantees are not necessarily coextensive with those protected by the Federal Constitution.[7] When a provision of a state constitution was not intended merely to mirror a provision of the Federal Constitution, the state provision should not be equated with that of its federal counterpart, and federal jurisprudence does not govern the interpretation of the state provision.[8] Furthermore, the fact that a state constitutional provision is in pari materia with a federal one or has a federal counterpart does not mean that the provision will always be interpreted or applied in the same manner as its federal counterpart.[9]

An independent analysis under a state constitution does not mean that the court will reach a different result from that reached by the U.S. Supreme Court under a similar constitutional provision.[10] When interpreting a state constitution in light of federal requirements, courts will consider the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation.[11] There must be cogent reasons for a judicial departure from a construction placed on a similar constitutional provision by the United States Supreme Court, particularly when the expressly stated purpose of the state provision was to add a protection already part of the Federal Constitution to the state's charter of liberties.[12] A state court may diverge from federal constitutional precedent in interpreting an analogous provision of a state constitution for either a flawed federal analysis, structural differences between the state and federal government, or distinctive state characteristics.[13] In determining that a state constitutional provision requires a separate and independent constitutional analysis from the Federal Constitution, a court may consider such factors as the textual language of the state constitution, differences in the texts of parallel provisions of the federal and state constitutions, state constitutional and common law history, preexisting state law, structural differences between the federal and state constitutions, and matters of particular state or local concern.[14] If the court has already determined in a particular context the appropriate state constitutional analysis under a provision of a state constitution, no analysis to determine if the state constitution offers more protection than the Federal Constitution is necessary.[15] In such circumstances, the court will apply the already determined independent state constitutional analysis in deciding whether a state constitutional violation has occurred provided the issue is otherwise properly raised.[16] Whenever possible, a state supreme court will construe the state constitution to avoid conflict with the Federal Constitution and statutes.[17] Compliance with federal law is not an implied but rather an express condition on enforcing any provision in a state constitution.[18]

CUMULATIVE SUPPLEMENT

Cases:

The six non-exclusive neutral criteria that are relevant to determining whether Wyoming Constitution extends broader rights to Wyoming citizens than United States Constitution are neither compulsory nor exclusive, and instead, they provide framework for analyzing a state constitutional claim: (1) textual language; (2) differences in texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Sheesley v. State, 2019 WY 32, 437 P.3d 830 (Wyo. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Iowa—State v. Biddle, 652 N.W.2d 191 (Iowa 2002).

2 Ariz.—Barrows v. Garvey, 67 Ariz. 202, 193 P.2d 913 (1948).
Vt.—State Highway Bd. v. Gates, 110 Vt. 67, 1 A.2d 825 (1938).

3 U.S.—Vigil v. Regents of University of Michigan, 980 F. Supp. 2d 790, 304 Ed. Law Rep. 477 (E.D. Mich. 2013) (Michigan Constitution).

Fla.—Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc., 978 So. 2d 134 (Fla. 2008).

Freedom of speech

The guaranty of freedom of speech under a state constitution is substantially similar to that enunciated in the First Amendment and should not be interpreted differently.

Md.—Pack Shack, Inc. v. Howard County, 138 Md. App. 59, 770 A.2d 1028 (2001), judgment rev'd on other grounds, 377 Md. 55, 832 A.2d 170 (2003).

Equal Protection Clause

(1) Protection provided in the Equal Protection Clause of the United States Constitution is coextensive with that provided in the state constitution, and thus courts will apply them as one.

Ga.—Nodvin v. State Bar of Georgia, 273 Ga. 559, 544 S.E.2d 142 (2001).

(2) Wisconsin courts treat the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution and the Wisconsin Constitution as equivalent because there is no substantial difference between them.

Wis.—State v. Piddington, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528 (2001).

Due process

(1) In cases raising substantive due process claims under a state constitution, the state court uses the standards developed by the United States Supreme Court under the Federal Constitution.

N.J.—Roman Check Cashing, Inc. v. New Jersey Department of Banking and Ins., 169 N.J. 105, 777 A.2d 1 (2001).

(2) The same due process protections guaranteed by the Fourteenth Amendment to the U.S. Constitution are also guaranteed by the inherent-rights clause of the state constitution.

Okla.—Eastern Oklahoma Bldg. & Const. Trades Council v. Pitts, 2003 OK 113, 82 P.3d 1008 (Okla. 2003).

(3) "Law of the land," within meaning of the state constitution's law of the land clause—under which no person may be deprived of his or her life, liberty, or property except pursuant to the law of the land—is synonymous with due process of law as used in the Fourteenth Amendment to the Federal Constitution.

N.C.—Bacon v. Lee, 353 N.C. 696, 549 S.E.2d 840 (2001).

4 Cal.—People v. Bustamante, 30 Cal. 3d 88, 177 Cal. Rptr. 576, 634 P.2d 927 (1981).

Iowa—State v. Davis, 304 N.W.2d 432 (Iowa 1981).

Haw.—Huihui v. Shimoda, 64 Haw. 527, 644 P.2d 968 (1982).

La.—State v. Hernandez, 410 So. 2d 1381 (La. 1982).

Ohio—State ex rel. Heller v. Miller, 61 Ohio St. 2d 6, 15 Ohio Op. 3d 3, 399 N.E.2d 66 (1980).

5 Cal.—DVD Copy Control Ass'n, Inc. v. Bunner, 31 Cal. 4th 864, 4 Cal. Rptr. 3d 69, 75 P.3d 1 (2003), as modified, (Oct. 15, 2003).

Haw.—State v. Davis, 133 Haw. 102, 324 P.3d 912 (2014).

N.C.—Bacon v. Lee, 353 N.C. 696, 549 S.E.2d 840 (2001).

No violation of federal Constitution

A court is not required to interpret the state constitution in line with the Federal Constitution as long as the court's interpretation does not itself violate any provision of the Federal Constitution.

Iowa—In re Detention of Garren, 620 N.W.2d 275 (Iowa 2000).

6 Iowa—NextEra Energy Resources LLC v. Iowa Utilities Bd., 815 N.W.2d 30 (Iowa 2012).

7 Cal.—East Bay Asian Local Development Corp. v. State of California, 24 Cal. 4th 693, 102 Cal. Rptr. 2d 280, 13 P.3d 1122 (2000).

Not coextensive

Ind.—McIntosh v. Melroe Co., a Div. of Clark Equipment Co., Inc., 729 N.E.2d 972 (Ind. 2000).

Unique vitality

A state constitution has unique vitality even if its words parallel the federal language.

Ind.—State v. Gerschoffer, 763 N.E.2d 960 (Ind. 2002).

8 Ind.—City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment, 744 N.E.2d 443 (Ind. 2001).

State constitution not in "lock step" with U.S. Constitution

Since the Declaration of Rights in the Delaware Constitution is not a mirror image of the Federal Bill of Rights, Delaware judges cannot faithfully discharge the responsibilities of their office by simply holding that

the Declaration of Rights is necessarily in "lock step" with the United States Supreme Court's construction of the Federal Bill of Rights.

Del.—Doe v. Wilmington Housing Authority, 88 A.3d 654 (Del. 2014).

9 Md.—Dua v. Comcast Cable of Maryland, Inc., 370 Md. 604, 805 A.2d 1061 (2002).

Essentially the same language

A state constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution even if both constitutions employ essentially the same language.

Mass.—Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003).

10 Idaho—Garcia v. State Tax Com'n of State of ID, 136 Idaho 610, 38 P.3d 1266 (2002).

11 N.C.—Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377 (2002).

12 Cal.—East Bay Asian Local Development Corp. v. State of California, 24 Cal. 4th 693, 102 Cal. Rptr. 2d 280, 13 P.3d 1122 (2000).

Burden on defendant

Although a state court, as final interpreter of the state constitution, has final say on what process is due in any given situation, it is the defendant's burden to explain how and why the state court should interpret the state constitution as providing greater protection than its federal counterpart.

Vt.—State v. Hayes, 170 Vt. 618, 752 A.2d 16 (2000).

13 N.M.—State v. Cardenas-Alvarez, 2001-NMSC-017, 130 N.M. 386, 25 P.3d 225 (2001).

14 Mich.—People v. Goldston, 470 Mich. 523, 682 N.W.2d 479 (2004).

Wash.—Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wash. 2d 791, 83 P.3d 419 (2004).

15 Wash.—State v. Reichenbach, 153 Wash. 2d 126, 101 P.3d 80 (2004).

16 Wash.—State v. Reichenbach, 153 Wash. 2d 126, 101 P.3d 80 (2004).

17 Ariz.—US West Communications, Inc. v. Arizona Corp. Com'n, 201 Ariz. 242, 34 P.3d 351 (2001).

18 N.C.—Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377 (2002).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

A. Construction

5. Extrinsic Aids to Construction

§ 113. Provisions adopted from or related to other constitutions or statutes—Scope of rights as potentially broader under a state constitution

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 614, 615, 617, 618, 633

Although a state supreme court cannot interpret a state constitution to provide less protection than that provided by the Federal Constitution, a state court may construe a provision of a state constitution to extend greater rights than a comparable provision in the Federal Constitution.

Federal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not preclude state governments from affording higher level of protection for such rights.[1] Although a state court cannot interpret a state constitution to provide less protection than that provided by the Federal Constitution,[2] it may construe a provision of a state constitution to extend greater rights than a comparable provision in the Federal Constitution.[3] Thus, the Federal Constitution represents the floor for basic freedoms, the state constitution the ceiling.[4] When the Federal Constitution affords citizens of a state less protection than does the state constitution, the state court of last resort has not merely the authority to give full effect to the state-law protection; it has also the duty to do so.[5]

An analysis of whether a provision of the state constitution provides a right greater than a right under the Federal Constitution is appropriate if the contours of the state constitution are not fully developed.[6] The state constitution will be interpreted to afford greater protection than the Federal constitution only when unique[7] or peculiar[8] aspects of state history, jurisprudence, or law support that separate interpretation.[9] The court must conclude that the federal analysis is flawed; there are structural differences between the state and federal government; or distinctive state characteristics are presented.[10]

The state courts should, however, reject an unprincipled creation of state constitutional rights that exceed their federal counterparts[11] and should not recognize broader state constitutional rights in a cavalier manner.[12] Furthermore, although state constitutional protections may extend beyond those guaranteed under the Federal Constitution, states cannot provide rights that are preempted, expressly or impliedly, under the Federal Constitution.[13] A determination that a given state constitutional provision affords enhanced protection when compared to the corresponding federal constitutional provision in a particular context does not necessarily mandate such a result in a different context.[14] In considering whether the state constitution affords greater protection than its federal counterpart, the court considers: (1) the text of the operative constitutional provisions; (2) related state court precedents; (3) persuasive relevant federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of the court's constitutional forebears; and (6) contemporary understandings of applicable economic and sociological norms or, as otherwise described, relevant public policies.[15]

Footnotes

1 U.S.—Chau v. Lewis, 935 F. Supp. 2d 644 (S.D. N.Y. 2013), aff'd, 771 F.3d 118 (2d Cir. 2014).
Conn.—State v. Kelly, 313 Conn. 1, 95 A.3d 1081 (2014).

2 U.S.—Chau v. Lewis, 935 F. Supp. 2d 644 (S.D. N.Y. 2013), aff'd, 771 F.3d 118 (2d Cir. 2014).
Iowa—State v. Cline, 617 N.W.2d 277 (Iowa 2000) (abrogated on other grounds by, State v. Turner, 630 N.W.2d 601 (Iowa 2001)).
Kan.—State v. Lawson, 296 Kan. 1084, 297 P.3d 1164 (2013).

3 U.S.—Chau v. Lewis, 935 F. Supp. 2d 644 (S.D. N.Y. 2013), aff'd on other grounds, 771 F.3d 118 (2d Cir. 2014).
Haw.—State v. Walton, 133 Haw. 66, 324 P.3d 876 (2014).
Kan.—State v. Lawson, 296 Kan. 1084, 297 P.3d 1164 (2013).
Mass,—Com. v. Augustine, 467 Mass. 230, 4 N.E.3d 846 (2014).
Minn.—State v. McMurray, 860 N.W.2d 686 (Minn. 2015).
Mont.—State v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104 (2011).
Okla.—In re Adoption of K.P.M.A., 2014 OK 85, 341 P.3d 38 (Okla. 2014).
Pa.—Com. v. Chamberlain, 612 Pa. 107, 30 A.3d 381 (2011).
Tenn.—State v. Watkins, 362 S.W.3d 530 (Tenn. 2012).
Utah—Jensen ex rel. Jensen v. Cunningham, 2011 UT 17, 250 P.3d 465 (Utah 2011).
Perversion of independent-state-grounds concept
Perversion of the independent-state-grounds concept occurs when the doctrine—under which a sovereign state may adopt its own constitutional protections that are broader than those provided by the Federal Constitution—is used not to interpret and apply genuinely independent state law but when it is misused to adopt a preferred, but minority, version of federal law over the prevailing, but nonpreferred, version of that law.
Md.—Ashford v. State, 147 Md. App. 1, 807 A.2d 732 (2002).

4 U.S.—Exford v. City of Montgomery, 887 F. Supp. 2d 1210 (M.D. Ala. 2012).
Fla.—State v. Washington, 114 So. 3d 182 (Fla. 3d DCA 2012).
N.Y.—People v. Sanad, 1 N.Y.S.3d 887 (N.Y. City Crim. Ct. 2015).
S.C.—State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015).
Criminal justice system

States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.

Mo.—State v. Moad, 398 S.W.3d 904 (Mo. Ct. App. W.D. 2013).

5 N.J.—State v. McAllister, 184 N.J. 17, 875 A.2d 866 (2005).

6 Wash.—State v. Walker, 182 Wash. 2d 463, 341 P.3d 976 (2015).

7 Tex.—Cobb v. State, 85 S.W.3d 258 (Tex. Crim. App. 2002).

8 Minn.—State v. McMurray, 860 N.W.2d 686 (Minn. 2015).

9 Minn.—State v. McMurray, 860 N.W.2d 686 (Minn. 2015).

Tex.—Cobb v. State, 85 S.W.3d 258 (Tex. Crim. App. 2002).

10 N.M.—State v. Rivera, 2010-NMSC-046, 148 N.M. 659, 241 P.3d 1099 (2010).

11 Mich.—People v. Tanner, 496 Mich. 199, 853 N.W.2d 653 (2014).

12 Minn.—State v. Wiegand, 645 N.W.2d 125 (Minn. 2002).

Cautious extension of rights

Caution is required when court extends protections of state constitution beyond limits set by the United States Supreme Court for parallel provisions in Federal Constitution.

N.J.—Planned Parenthood of Cent. New Jersey v. Farmer, 165 N.J. 609, 762 A.2d 620 (2000).

13 N.J.—Committee to Recall Robert Menendez From the Office of U.S. Senator v. Wells, 204 N.J. 79, 7 A.3d 720 (2010).

14 Wash.—State v. McKinney, 148 Wash. 2d 20, 60 P.3d 46 (2002).

15 Conn.—State v. Williams, 311 Conn. 626, 88 A.3d 534 (2014).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

1. Time of Taking Effect

§ 114. Time of taking effect, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 625

A constitution itself may fix the time when it takes effect; in the absence of an express provision fixing the date of taking effect of a new state constitution, it becomes effective from the time of its ratification by the voters.

The constitution itself may stipulate its own effective date.[1] The Federal Constitution did not become operative until: (1) it was adopted by nine states, and (2) a day for commencing proceedings under the Constitution had been appointed by Congress in conformity with the resolution of the convention.[2] In the absence of an express provision fixing the effective date of a new state constitution, it becomes effective from the time of its ratification by the voters.[3] However, if so provided by the enabling act, the constitution becomes effective on proclamation by the governor and not on ratification by the voters.[4] A provision of a constitution fixing the time when amendments will take effect does not fix the effective date of a new constitution.[5]

Footnotes

1 Idaho—Cleary v. Kincaid, 23 Idaho 789, 131 P. 1117 (1913).
La.—State ex rel. Ball v. Cain, 52 La. Ann. 2120, 28 So. 226 (1900).
N.Y.—Real v. People, 42 N.Y. 270, 1870 WL 7712 (1870).

2 U.S.—Owings v. Speed, 18 U.S. 420, 5 L. Ed. 124, 1820 WL 2129 (1820).

Indian treaty entered into by state

The provision of the Constitution granting Congress the power to regulate commerce with Indian tribes and precluding states from entering into any treaty did not prevent a state from entering a treaty with an Indian nation in 1788.

U.S.—Oneida Indian Nation of New York v. State of N. Y., 520 F. Supp. 1278, 65 A.L.R. Fed. 606 (N.D. N.Y. 1981), judgment aff'd in part, rev'd in part on other grounds, 691 F.2d 1070, 11 Fed. R. Evid. Serv. 1002 (2d Cir. 1982).

3 U.S.—Town of Louisville v. Portsmouth Sav. Bank, 104 U.S. 469, 26 L. Ed. 775, 1881 WL 19877 (1881).
Tex.—Koy v. Schneider, 110 Tex. 369, 221 S.W. 880 (1920).

4 Ala.—City of Bessemer v. Birmingham Elec. Co., 252 Ala. 171, 40 So. 2d 193 (1949).

5 Ala.—City of Bessemer v. Birmingham Elec. Co., 252 Ala. 171, 40 So. 2d 193 (1949).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

1. Time of Taking Effect

§ 115. Amendment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 625

A constitutional amendment becomes effective upon approval or ratification by the electorate unless some other date is fixed by the constitution or by the amendment itself.

A constitutional amendment becomes effective upon approval or ratification by the electorate[1] unless some other date is fixed by the constitution[2] or by the amendment itself.[3]

Unless a constitutional amendment provides otherwise, it takes effect upon the certification of a statewide canvass of the votes[4] or upon a specified time after the official declaration of the vote by a specified officer.[5]

Footnotes

1 Ga.—Pye v. State Highway Dept., 226 Ga. 389, 175 S.E.2d 510 (1970).

Mass.—Opinion of the Justices, 362 Mass. 907, 287 N.E.2d 910 (1972).
Pa.—Com. v. Tharp, 562 Pa. 231, 754 A.2d 1251 (2000).
W. Va.—State ex rel. Casey v. Pauley, 158 W. Va. 298, 210 S.E.2d 649 (1975).

2 Ga.—J. W. A. v. State, 233 Ga. 683, 212 S.E.2d 849 (1975).
Pa.—Com. v. Tharp, 562 Pa. 231, 754 A.2d 1251 (2000).
Ohio—State ex rel. Schwartz v. Brown, 32 Ohio St. 2d 4, 61 Ohio Op. 2d 151, 288 N.E.2d 821 (1972).

3 Cal.—Pugh v. City of Sacramento, 119 Cal. App. 3d 485, 174 Cal. Rptr. 119 (3d Dist. 1981).
Pa.—Com. v. Tharp, 562 Pa. 231, 754 A.2d 1251 (2000).

4 Conn.—State v. Sanabria, 192 Conn. 671, 474 A.2d 760 (1984).
Wis.—State v. Gonzales, 2002 WI 59, 253 Wis. 2d 134, 645 N.W.2d 264 (2002).

5 Mass.—Opinion of the Justices, 362 Mass. 907, 287 N.E.2d 910 (1972).
Nev.—Torvinen v. Rollins, 93 Nev. 92, 560 P.2d 915 (1977).

Proclamation of governor

Colo.—Bolt v. Arapahoe County School Dist. No. Six, 898 P.2d 525, 101 Ed. Law Rep. 1185 (Colo. 1995).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

2. Retroactive Operation

§ 116. Retroactive operation of constitutions, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 632

Constitutional provisions generally operate prospectively and do not operate retrospectively unless the language used or the purpose of the provision indicates that intent.

The general rule is that a constitutional provision has a prospective effect only unless its language clearly indicates an intent to apply the provision retroactively,[1] and this rule is also applicable to constitutional amendments.[2] Constitutional amendments are presumed to have a purely prospective application, and overcoming the presumption requires either an express retroactivity provision in the actual language of the amendment or extrinsic sources that leave no doubt that such was the voters' manifest intent.[3]

Footnotes

1 U.S.—Evans v. Utah, 21 F. Supp. 3d 1192 (D. Utah 2014) (applying Utah law).
Colo.—Huber v. Colorado Mining Ass'n, 264 P.3d 884 (Colo. 2011).

Iowa—State v. Bates, 305 N.W.2d 426 (Iowa 1981).
Ill.—People v. Dean, 175 Ill. 2d 244, 222 Ill. Dec. 413, 677 N.E.2d 947 (1997).
La.—State v. Cousan, 684 So. 2d 382 (La. 1996).
S.D.—Kneip v. Herseth, 87 S.D. 642, 214 N.W.2d 93 (1974).
W. Va.—State ex rel. Maloney v. McCartney, 159 W. Va. 513, 223 S.E.2d 607 (1976).

Express provisions

Express provisions in the constitutions of some states or of schedules annexed thereto prevent retroactive operation in certain respects.

Mont.—Rogers v. Rogers, 169 Mont. 403, 548 P.2d 141 (1976).

Language in present tense not determinative

The circumstance that the language of a measure is written in the present tense does not clearly demonstrate that the measure is intended to apply retroactively.

Cal.—Strauss v. Horton, 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (2009), as modified, (June 17, 2009)

2 Ark.—U.S. Term Limits, Inc. v. Hill, 316 Ark. 251, 872 S.W.2d 349 (1994), judgment aff'd, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).
Cal.—Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County, 218 Cal. App. 4th 195, 159 Cal. Rptr. 3d 424 (1st Dist. 2013).
Colo.—Bolt v. Arapahoe County School Dist. No. Six, 898 P.2d 525, 101 Ed. Law Rep. 1185 (Colo. 1995).
Miss.—Board on Law Enforcement Officer Standards and Training v. Voyles, 732 So. 2d 216 (Miss. 1999).
Neb.—State v. Reeves, 258 Neb. 511, 604 N.W.2d 151 (2000).
Okla.—Fent v. Henry, 2011 OK 10, 257 P.3d 984 (Okla. 2011), as corrected, (Feb. 15, 2011).
Utah—State v. Wacek, 703 P.2d 296 (Utah 1985).

Presumption of prospective application

Unless the language of an amendment to a state constitution manifests an intent to make its provisions retroactive in operation, a supreme court must presume that the amendment has only prospective application.

Colo.—Jackson v. State, 966 P.2d 1046 (Colo. 1998).

Rule governing retroactivity of statutes applies

The rule used to determine when a statute operates retroactively can also be used to determine if a constitutional amendment operates retroactively.

Wash.—State v. Belgarde, 119 Wash. 2d 711, 837 P.2d 599 (1992).

Sovereign immunity

A constitutional amendment extending sovereign immunity to all state departments and agencies, regardless of any insurance, applied prospectively only, in the absence of an indication of contrary legislative intent.

Ga.—Donaldson v. Department of Transp., 262 Ga. 49, 414 S.E.2d 638 (1992).

3 Cal.—Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County, 218 Cal. App. 4th 195, 159 Cal. Rptr. 3d 424 (1st Dist. 2013).

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Retroactive Application, in Postconviction Proceedings, of Constitutional Rule of Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), that Mandatory Life Sentence Without Parole for Those Under Age of 18 at Time of Their Homicide Crimes Violates Eighth Amendment's Prohibition of Cruel and Unusual Punishments, 102 A.L.R.6th 637.

Construction and Application of Teague Rule Concerning Whether Constitutional Rule of Criminal Procedure Applies Retroactively to Case on Collateral Review—Supreme Court Cases, 44 A.L.R. Fed. 2d 557.

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2. Retroactive Operation

§ 117. Property rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 632

The adoption of constitutional provisions affecting property rights operates prospectively only unless it appears, expressly or by necessary implication, that they were intended to operate retrospectively.

The adoption of constitutional provisions abrogating or otherwise affecting property rights operates prospectively and has no effect on property rights that are vested at the time of their adoption, at least if it does not clearly appear—expressly or by necessary implication—that they were intended to operate retrospectively.[1] A state may use a change in its constitution to divest or impair vested rights that have vested prior to that change.[2]

An amendment is not retroactively applicable to alter the nature of the title to real property held by a husband and wife when that title terminated.[3] Similarly, a constitutional amendment abrogating the distinction between married women and men in the holding and disposition of real property is not retroactively applied.[4]

Footnotes

1 U.S.—Groves v. Board of Public Instruction of Manatee County, 109 F.2d 522 (C.C.A. 5th Cir. 1940).
Mo.—Fisher v. Reorganized School Dist. No. R-V of Grundy County, 567 S.W.2d 647 (Mo. 1978).

2 La.—Haas v. Board of Com'rs of Red River, Atchafalaya and Bayou Boeuf Levee Dist., 206 La. 378, 19 So. 2d 173 (1944) (constitutional provision requiring the reservation of mineral rights on property sold by the state was not retroactive).

3 U.S.—Forbes v. U.S., 472 F. Supp. 840 (D. Mass. 1979).

4 Fla.—Bogle v. Perkins, 240 So. 2d 801 (Fla. 1970).

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§ 118. Governmental and political matters

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 632

Generally, constitutional provisions dealing with governmental or political matters operative prospectively.

The general rule respecting the prospective application of constitutional provisions applies to governmental and political matters.[1] A constitutional provision subjecting an officer to removal for failing to waive immunity on being questioned by a grand jury is not limited to requiring a waiver concerning questions with respect to transactions that occurred after the effective date of the amendment.[2]

An express provision of a constitution prohibiting retroactive application of its provisions precludes the retroactive application of a new constitution's provision for terms of office.[3] Similarly, an amendment lengthening[4] or shortening the term of a public office does not operate retrospectively so as to affect incumbents unless its terms clearly disclose an intention to do so.[5]

An electorate may intend that a constitutional provision requiring voter approval for increased or new taxes to apply retrospectively to school districts as of a certain date.[6] By contrast, constitutional provisions limiting the power of taxation to a certain percentage of the taxable property have been found not to apply to taxes that were assessed before the provisions were

adopted.[7] Some constitutional prohibitions with respect to limitations on a tax rate are directed to taxation concerning new, and not of preexisting, debts.[8]

A constitutional amendment providing that a provision shall be made by appropriation by every city for the payment of interest on all indebtedness applies to interest that becomes due after the effective date of the amendment regardless of whether the debt was incurred prior to or after that date.[9]

Footnotes

1 Mich.—Quaid v. City of Detroit, 319 Mich. 268, 29 N.W.2d 687 (1947).
Pa.—In re Butler Tp., Butler County, 438 Pa. 302, 264 A.2d 676 (1970).
S.C.—Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973).

2 N.Y.—Canteline v. McClellan, 282 N.Y. 166, 25 N.E.2d 972 (1940).

3 La.—Calogero v. State ex rel. Treen, 445 So. 2d 736 (La. 1984) (terms for judges).

4 Ind.—Whitcomb v. Young, 258 Ind. 127, 279 N.E.2d 566 (1972).

5 Ga.—Powell v. Price, 201 Ga. 833, 41 S.E.2d 539 (1947).
S.D.—Kneip v. Herseth, 87 S.D. 642, 214 N.W.2d 93 (1974).
Amendment adopted at same election
Ind.—Kirkpatrick v. King, 228 Ind. 236, 91 N.E.2d 785 (1950).

6 Colo.—Bolt v. Arapahoe County School Dist. No. Six, 898 P.2d 525, 101 Ed. Law Rep. 1185 (Colo. 1995).

7 Tex.—Rees v. State, 149 S.W.2d 184 (Tex. Civ. App. Texarkana 1941), writ dismissed, judgment correct.
Wash.—Gellantly v. Chelan County, 85 Wash. 2d 314, 534 P.2d 1027 (1975).

8 Ohio—State ex rel. City of Akron v. Slusser, 75 Ohio App. 141, 30 Ohio Op. 456, 61 N.E.2d 318 (9th Dist. Summit County 1944), judgment aff'd, 144 Ohio St. 123, 29 Ohio Op. 27, 56 N.E.2d 239 (1944).

9 N.Y.—Van Derzee v. City of Long Beach, 265 A.D. 1059, 39 N.Y.S.2d 401 (2d Dep't 1943).

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§ 119. Judicial proceedings

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 632

A constitutional provision dealing with procedure has been held to operate prospectively only unless an intention to the contrary is clearly shown, but there is also authority to the effect that such a provision applies to all actions within its terms—whether commenced before or after its enactment—absent a contrary intention.

It has been held that unlike a statute, a constitutional provision dealing with judicial procedure operates prospectively only unless an intention to the contrary is clearly shown.[1] However, it has also been held that a constitutional provision dealing with procedure applies to all actions within its terms, whether commenced before or after its enactment, unless an intention to the contrary is expressed.[2] Particular constitutional provisions that abrogate appellate rights do not affect the rights of parties to proceedings that are pending at the time the provisions take effect.[3] A constitutional amendment that could not impair any contract or vested rights, except those of the State, is subject to the rule that laws of prescription and limitation operate only retrospectively.[4]

Criminal prosecutions.

A provision prohibiting the state from denying or abridging equal protection on account of gender is not retroactively applied in criminal prosecutions.[5] A Victims' Bill of Rights applies to a case that was filed before the effective date of the Bill of Rights.[6]

Footnotes

1 La.—Perez v. Perez, 334 So. 2d 719 (La. Ct. App. 4th Cir. 1976).

2 N.J.—Cole v. I. Lewis Cigar Mfg. Co., 3 N.J. 9, 68 A.2d 737 (1949) (change in jurisdiction of appellate court).

Judicial review of administrative decisions

A provision of a constitution that judicial review must be had of all final decisions of any administrative body is procedural in nature and applies to all cases that fall within its terms whether commenced before or after its effective date.

Mo.—Henderson v. Laclede Christy Clay Products Co., 206 S.W.2d 673 (Mo. Ct. App. 1947).

Scope of review on certiorari

Mo.—State ex rel. Northwestern Mut. Life Ins. Co. v. Bland, 354 Mo. 391, 189 S.W.2d 542, 161 A.L.R. 423 (1945).

3 Ark.—Thornton v. Commonwealth Federal Sav. & Loan Ass'n, 202 Ark. 670, 152 S.W.2d 304 (1941).

4 La.—State v. Alden Mills, 202 La. 416, 12 So. 2d 204 (1943).

5 Ill.—People v. Grammer, 62 Ill. 2d 393, 342 N.E.2d 371 (1976) (aggravated incest).

6 Ariz.—Knapp v. Martone, 170 Ariz. 237, 823 P.2d 685 (1992).

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Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights, 91 A.L.R.5th 343.

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§ 120. Constitutions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 614, 615, 617, 630 to 633

The provisions of a constitution that are not continued in force by the new constitution are superseded by the adoption of the new constitution, and furthermore, a new constitutional provision that contains some of the same subject matter will suspend inconsistent former provisions.

The adoption of a new constitution repeals and supersedes all the provisions of the older constitution that are not continued in force by the new instrument.[1] A new constitutional provision that contains some of the same subject matter will suspend inconsistent former provisions whether or not those provisions are specifically mentioned.[2] In other words, when two constitutional provisions are found to be in conflict, the later in time prevails as it is the most recent expression of the will of the people.[3]

Enabling act.

The enabling act under which a state is admitted to the union is the fundamental and paramount law and cannot be affected by the state constitution.[4]

Footnotes

1 Ga.—Walker Elec. Co. v. Walton, 203 Ga. 246, 46 S.E.2d 184 (1948).
N.D.—Dawson v. Tobin, 74 N.D. 713, 24 N.W.2d 737 (1946).
Use of English
U.S.—Puerto Rican Organization for Political Action v. Kusper, 490 F.2d 575 (7th Cir. 1973).

2 Okla.—City of Guymon v. Butler, 2004 OK 37, 92 P.3d 80 (Okla. 2004).

3 Mo.—Thompson v. Hunter, 119 S.W.3d 95, 182 Ed. Law Rep. 986 (Mo. 2003).

4 Ariz.—Murphy v. State, 65 Ariz. 338, 181 P.2d 336 (1947).

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§ 121. Constitutions—Amendments

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 614, 615, 617, 630 to 633

An amendment to a state constitution will not be ineffectual or invalid merely because it conflicts with existing provisions; rather, a more recent constitutional amendment will prevail over a prior constitutional provision that is in conflict with it.

A more recent state constitutional amendment will prevail over a prior constitutional provision that conflicts with it.[1] Thus, the newly enacted amendment is not ineffectual or invalid merely because it conflicts with existing provisions.[2] However—in the absence of express repeal—an earlier provision remains in force insofar as it is not repugnant to the amendment.[3] In order to effect a repeal, the repugnance must be so clear and positive that the provisions cannot consistently stand together.[4]

To effect an amendment of an existing constitutional provision, the intent to amend must be clear and unmistakable from the language employed.[5] A constitutional amendment that does not include language indicating an intent (express or implied) to repeal a constitutional provision merely supersedes the law existing prior to its enactment and modifies the constitutional provision.[6] Even though an amendment does not in terms expressly repeal a constitutional provision, the amendment will be

regarded as a substitute for, and as superseding, the existing provision if it covers the same subject.[7] Repeals by implication, however, are generally not favored,[8] and every reasonable effort will be made to validate both provisions.[9]

Repeal and revival.

An amendment which is repealed by a later amendment is not revived by a still later amendment which repeals the intermediate amendment, in the absence of any provision for such revival in the latest amendment.[10]

Footnotes

1 Ga.—Copeland v. State, 268 Ga. 375, 490 S.E.2d 68 (1997).
Okla.—Eastern Oklahoma Bldg. & Const. Trades Council v. Pitts, 2003 OK 113, 82 P.3d 1008 (Okla. 2003).
S.D.—In re Certification of a Question of Law from U.S. Dist. Court, Dist. of South Dakota, Western Div., 2000 SD 97, 615 N.W.2d 590 (S.D. 2000).
W. Va.—State ex rel. Boards of Educ. of the Counties of Upshur, et al. v. Chafin, 180 W. Va. 219, 376 S.E.2d 113, 51 Ed. Law Rep. 637 (1988).
Wyo.—Parker v. Energy Development Co., 691 P.2d 981 (Wyo. 1984).

2 Ga.—Harry v. Glynn County, 269 Ga. 503, 501 S.E.2d 196 (1998).
Initiative amendment
A conflict with existing articles or sections of a constitution can afford no logical basis for invalidating an initiative amendment.
Neb.—Hall v. Progress Pig, Inc., 259 Neb. 407, 610 N.W.2d 420 (2000).

3 Fla.—Jackson v. Consolidated Government of City of Jacksonville, 225 So. 2d 497 (Fla. 1969).
Kan.—VanSickle v. Shanahan, 212 Kan. 426, 511 P.2d 223 (1973).
Neb.—Ramsey v. Gage County, 153 Neb. 24, 43 N.W.2d 593 (1950).
Ohio—State ex rel. Davis v. Brown, 161 Ohio St. 346, 53 Ohio Op. 251, 119 N.E.2d 277 (1954).
Tex.—Snelson v. Murray, 252 S.W.2d 720 (Tex. Civ. App. El Paso 1952), writ refused n.r.e.
Wyo.—Matter of Johnson, 568 P.2d 855 (Wyo. 1977).

4 Fla.—Wilson v. Crews, 160 Fla. 169, 34 So. 2d 114 (1948).
Ga.—McLennan v. Aldredge, 223 Ga. 879, 159 S.E.2d 682 (1968).
Neb.—Cunningham v. Exon, 207 Neb. 513, 300 N.W.2d 6 (1980) (irreconcilable conflict).

5 Ga.—DeJarnette v. Hospital Authority of Albany, 195 Ga. 189, 23 S.E.2d 716 (1942).
Neb.—Cunningham v. Exon, 207 Neb. 513, 300 N.W.2d 6 (1980).

6 Okla.—Fent v. Henry, 2011 OK 10, 257 P.3d 984 (Okla. 2011), as corrected, (Feb. 15, 2011).

7 U.S.—Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), cert. denied, 135 S. Ct. 271, 190 L. Ed. 2d 139 (2014) (applying Oklahoma law).
Fla.—Jackson v. Consolidated Government of City of Jacksonville, 225 So. 2d 497 (Fla. 1969).
Ga.—Johnston v. Hicks, 225 Ga. 576, 170 S.E.2d 410 (1969).
Okla.—Wiseman v. Boren, 1976 OK 2, 545 P.2d 753 (Okla. 1976).
S.D.—Kneip v. Herseth, 87 S.D. 642, 214 N.W.2d 93 (1974).
Omissions
An omission of part of an original provision on an amendment implies the intention that the omitted part should become ineffective.
Ill.—People v. Hemphill, 96 Ill. App. 2d 407, 238 N.E.2d 601 (4th Dist. 1968).
Compensation limited to Workers' Compensation Act
A constitutional amendment that provided that an employee's right to compensation from a workers' compensation fund was in lieu of and took the place of any and all rights of action against any employer contributing to the fund in favor of any person or persons by reason of any such injuries or death took precedence over an article of the constitution that gave a right of action to the party who sustained the injury

as a result of a willful failure to comply with provisions governing mines and mining, and therefore, an employee's death was compensable only under the Workers' Compensation Act.
Wyo.—Anderson v. Solvay Minerals, Inc., 3 P.3d 236 (Wyo. 2000).

8 Cal.—California School Boards Ass'n v. Brown, 192 Cal. App. 4th 1507, 122 Cal. Rptr. 3d 674, 265 Ed. Law Rep. 1147 (2d Dist. 2011).
Fla.—Jackson v. Consolidated Government of City of Jacksonville, 225 So. 2d 497 (Fla. 1969).
Ga.—McLennan v. Aldredge, 223 Ga. 879, 159 S.E.2d 682 (1968).
Idaho—Engelking v. Investment Bd., 93 Idaho 217, 458 P.2d 213 (1969).

9 Fla.—Barnett v. Antonacci, 122 So. 3d 400 (Fla. 4th DCA 2013), review denied, 139 So. 3d 884 (Fla. 2014).
Wyo.—Matter of Johnson, 568 P.2d 855 (Wyo. 1977).

10 Or.—City of Coos Bay v. Aerie No. 538 of Fraternal Order of Eagles, 179 Or. 83, 170 P.2d 389 (1946).

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§ 122. Statutes

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 633

Although repeals by implication are not favored, a constitutional amendment or provision operates to supersede or repeal all statutes that are inconsistent with the full operation of its provisions.

A new constitution is not intended to supersede the entire body of statutory law.[1] Existing statutes remain in full force and effect to the extent that they are not expressly or impliedly repealed by the constitution or its amendments[2] even though the amendment contains no express words to that effect.[3]

However, a constitutional provision that revises the entire subject matter of, and constitutes a substitute for, a statute will supersede that statute.[4] In the strictest sense, the process involving a revising statute or a revising constitutional amendment, which takes the place of all the former laws existing upon the subject with which it deals, is not repeal by implication.[5] Instead, the rationale is that when it appears from the framework of the revision that whatever is embraced in the new law will control and whatever is excluded is discarded, decisive evidence has been adduced of an intention to prescribe the latest provisions as the only ones on that subject that will be binding.[6]

A constitutional provision repeals and supersedes all statutes that are inconsistent with the full operation of its provisions.[7] Thus, a statute that is opposed to the plain terms of a later-adopted constitutional provision must be regarded as repealed by implication.[8] Courts are required to try to harmonize constitutional language with that of existing statutes if possible,[9] and repeals by implication are generally not favored.[10] Indeed, there is a presumption against them.[11]

A constitutional provision does not repeal a statute on the ground of repugnance or inconsistency unless they are clearly repugnant and so inconsistent that they cannot have concurrent operation.[12] A statute will continue in effect unless it is completely inconsistent with the plain terms of the constitution.[13] The basic test of whether an earlier statute is repealed by implication by a later constitution is whether the statute is sufficiently consistent with the new constitution to have been capable of passage after the new constitution took effect.[14]

Territorial laws.

Territorial laws are ordinarily not repealed by the admission of the territory as a state and the adoption of a state constitution except to the extent that those laws are inconsistent with the constitution.[15] A territorial statute may be superseded and rendered ineffective, however, if it conflicts with a provision of the state constitution.[16]

Repeal of constitutional provisions.

The repeal of a provision of a state constitution does not of itself repeal a state statute that contains provisions similar to, or covering the subject of, the repealed provision if the authority of the legislature to enact the statute was not derived from the repealed provision.[17]

CUMULATIVE SUPPLEMENT

Cases:

Amendment to Colorado Constitution, which legalized possession of small amounts of marijuana, applied retroactively and deprived the State of its power to continue to prosecute defendant for possession of less than one once of marijuana and marijuana concentrate during her appeal of her convictions; Amendment rendered the criminal statutory provisions inoperative to the extent that they criminalized possession of less than one once of marijuana and marijuana concentrate. Colo. Const. art. 18, § 16; Colo. Rev. Stat. Ann. §§ 18-18-406(1), 18-18-406(4)(b)(I). Russell v. People, 2017 CO 3, 387 P.3d 750 (Colo. 2017).

[END OF SUPPLEMENT]

Footnotes

1 Ga.—McKnight v. City of Decatur, 200 Ga. 611, 37 S.E.2d 915 (1946).

2 Colo.—People ex rel. Union Trust Co. v. Superior Court In and For City and County of Denver, 175 Colo. 391, 488 P.2d 66 (1971).
Fla.—Advisory Opinion to Governor—1996 Amendment 5 (Everglades), 706 So. 2d 278 (Fla. 1997) (consistent statutes remain in effect).
Ga.—State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334 (1976).

N.D.—State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977).
S.D.—Kneip v. Herseth, 87 S.D. 642, 214 N.W.2d 93 (1974).

3 Okla.—Fent v. Henry, 2011 OK 10, 257 P.3d 984 (Okla. 2011), as corrected, (Feb. 15, 2011).

4 Cal.—Fenton v. Markwell & Co., 11 Cal. App. 2d Supp. 755, 52 P.2d 297 (App. Dep't Super. Ct. 1935).
Okla.—Fent v. Henry, 2011 OK 10, 257 P.3d 984 (Okla. 2011), as corrected, (Feb. 15, 2011).

Intentional omission

Under the rule "expressio unius est exclusio alterius," an intentional omission from the constitutional amendment of the words "and appellate jurisdiction in the trial of chancery cases," appearing in a provision defining the jurisdiction of courts of appeal, deprived those courts of jurisdiction to review equitable causes de novo.

Ohio—Sicker v. Powers, 47 Ohio L. Abs. 161, 74 N.E.2d 638 (Ct. App. 5th Dist. Coshocton County 1946).

5 Okla.—Fent v. Henry, 2011 OK 10, 257 P.3d 984 (Okla. 2011), as corrected, (Feb. 15, 2011).

6 Okla.—Fent v. Henry, 2011 OK 10, 257 P.3d 984 (Okla. 2011), as corrected, (Feb. 15, 2011).

7 Ark.—Henslee v. Madison Guar. Sav. and Loan Ass'n, 297 Ark. 183, 760 S.W.2d 842 (1989) (irreconcilable conflict).
Fla.—Emhart Corp. v. Brantley, 257 So. 2d 273 (Fla. 3d DCA 1972).
Mo.—Matter of Additional Magistrates for St. Louis County, 580 S.W.2d 288 (Mo. 1979).
N.C.—Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).
S.D.—Kneip v. Herseth, 87 S.D. 642, 214 N.W.2d 93 (1974).
Effect of self-executing provisions of constitution on existing laws, see § 137.

Superiority of constitutional amendment

A constitutional amendment that changes prior statutory procedure is superior to a legislative act.

Ark.—Petition of Pitchford, 265 Ark. 752, 581 S.W.2d 321 (1979).

Substantive law

Wis.—Kayden Industries, Inc. v. Murphy, 34 Wis. 2d 718, 150 N.W.2d 447 (1967).

8 Ga.—DeKalb County v. Allstate Beer, Inc., 229 Ga. 483, 192 S.E.2d 342 (1972).
N.D.—State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977).
Ohio—Jelm v. Jelm, 155 Ohio St. 226, 44 Ohio Op. 246, 98 N.E.2d 401, 22 A.L.R.2d 1300 (1951).

9 Cal.—Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n, 209 Cal. App. 4th 1182, 147 Cal. Rptr. 3d 696 (4th Dist. 2012), as modified on denial of reh'g, (Oct. 31, 2012) and review denied, (Jan. 3, 2013).

10 Ark.—McKenzie v. Burris, 255 Ark. 330, 500 S.W.2d 357, 61 A.L.R.3d 250 (1973).
Ohio—Sicker v. Powers, 47 Ohio L. Abs. 161, 74 N.E.2d 638 (Ct. App. 5th Dist. Coshocton County 1946).

11 Nev.—Thomas v. Nevada Yellow Cab Corp., 327 P.3d 518, 130 Nev. Adv. Op. No. 52 (Nev. 2014).
S.D.—Kneip v. Herseth, 87 S.D. 642, 214 N.W.2d 93 (1974).

12 Ark.—Henslee v. Madison Guar. Sav. and Loan Ass'n, 297 Ark. 183, 760 S.W.2d 842 (1989).
Fla.—State v. Division of Bond Finance of Dept. of General Services, 278 So. 2d 614 (Fla. 1973).
Nev.—Thomas v. Nevada Yellow Cab Corp., 327 P.3d 518, 130 Nev. Adv. Op. No. 52 (Nev. 2014).
Ohio—State ex rel. Stokes v. Probate Court of Cuyahoga County, 17 Ohio App. 2d 247, 46 Ohio Op. 2d 416, 246 N.E.2d 607 (8th Dist. Cuyahoga County 1969).
Pa.—In re City of Greensburg, Hempfield Tp., Westmoreland County, 217 Pa. Super. 439, 272 A.2d 729 (1970).

Statute held not impliedly repealed

Judicial disqualification statutes, which deal with disqualification of a judge in a particular case, were not impliedly repealed by approval of a constitutional article governing the removal or suspension of a judge from judicial office.

Or.—State ex rel. Oliver v. Crookham, 302 Or. 533, 731 P.2d 1018 (1987).

13 Fla.—In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Medical Conditions, 132 So. 3d 786 (Fla. 2014).
Nev.—Thomas v. Nevada Yellow Cab Corp., 327 P.3d 518, 130 Nev. Adv. Op. No. 52 (Nev. 2014).

14 N.D.—State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977).
Ohio—State ex rel. Stokes v. Probate Court of Cuyahoga County, 17 Ohio App. 2d 247, 46 Ohio Op. 2d 416, 246 N.E.2d 607 (8th Dist. Cuyahoga County 1969).

15 Ariz.—Miller v. Heller, 68 Ariz. 352, 206 P.2d 569 (1949).

16 Mich.—Dearborn Tp. v. Dail, 334 Mich. 673, 55 N.W.2d 201 (1952).

Territorial charter

Ariz.—Miller v. Heller, 68 Ariz. 352, 206 P.2d 569 (1949).

17 Kan.—State ex rel. Smith v. Springer, 166 Kan. 283, 201 P.2d 116 (1948).

Pa.—In re City of Greensburg, Hempfield Tp., Westmoreland County, 217 Pa. Super. 439, 272 A.2d 729 (1970).

Statutes pertaining to intoxicating liquors

Kan.—Manning v. Davis, 166 Kan. 278, 201 P.2d 113 (1948).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

3. Superseding Laws Previously in Force

§ 123. Statutes—Special and local laws

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 633

Constitutional limitations on special or local laws, without more, do not operate to repeal or render inoperative preexisting laws of that class which were constitutional when enacted.

Constitutional limitations on special or local laws, without more, do not operate to repeal or render inoperative preexisting laws of that class which were constitutional when enacted.[1] A constitutional provision that bars local or special laws from being enacted, if not retroactive, does not operate as a repeal of such laws passed before the constitution went into effect.[2] General provisions operate as an implied repeal when they are clearly intended to cover the entire subject to which the prior acts relate and are inconsistent with those acts.[3]

Charters of municipal corporations.

A constitution does not necessarily render inoperative municipal charter provisions that are not inconsistent with the constitution.[4]

Footnotes

1 N.J.—Washington Nat. Ins. Co. v. Board of Review of N. J. Unemployment Compensation Commission, 1 N.J. 545, 64 A.2d 443 (1949).

2 N.C.—In re Wingler, 231 N.C. 560, 58 S.E.2d 372 (1950).

Enactment of consolidated or codified law as continuation

N.Y.—Robinson v. Broome County, 276 A.D. 69, 93 N.Y.S.2d 662 (3d Dep't 1949), judgment aff'd, 301 N.Y. 524, 93 N.E.2d 77 (1950).

3 Fla.—Bell v. Vaughn, 155 Fla. 551, 21 So. 2d 31 (1945).

4 Idaho—Common School Dist. No. 2 of Nez Perce County v. District No. 1 of Nez Perce County, 71 Idaho 192, 227 P.2d 947 (1951).

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§ 124. Statutes—Saving clauses

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 633

A constitutional provision to the effect that all existing laws not repugnant to the constitution are continued in force until they expire by their own limitation, or are repealed or altered by the legislature, has the effect of continuing in force statutes that are not in conflict with the constitution.

A constitutional provision to the effect that all existing laws not repugnant to the constitution are continued in force until they expire by their own limitation, or are repealed or altered by the legislature, has the effect of continuing in force statutes that are not in conflict with the constitution.[1] Some constitutional provisions continue in force statutory provisions that are in conflict with constitutional provisions that require legislation to enforce them.[2] The continuation is for only a specified period after the constitution is adopted, in the absence of amendment or repeal of the statute or any legislation to enforce the conflicting constitutional provision.[3]

Footnotes

1 N.J.—Application of Palmer, 61 A.2d 922 (N.J. County Ct. 1948).

Ohio—Sicker v. Powers, 47 Ohio L. Abs. 161, 74 N.E.2d 638 (Ct. App. 5th Dist. Coshocton County 1946).

Territorial laws

State constitutions that are adopted upon the admission of territories to statehood usually—by their terms, though with certain qualifications—continue in force the territorial laws.

N.D.—State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977).

2 Mo.—State v. Knight, 356 Mo. 1233, 206 S.W.2d 330 (1947).

3 Mo.—State v. Knight, 356 Mo. 1233, 206 S.W.2d 330 (1947).

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III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

3. Superseding Laws Previously in Force

§ 125. Common law

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 633

When a constitution is adopted, common law that is not in conflict with, or repugnant to, the organic law remains in effect.

The common law, insofar as it is not in conflict with, or repugnant to, the organic law, remains in effect on the adoption of a constitution.[1] As in the case of statutes, the common law is repealed by the constitution to the extent that it is inconsistent with the constitution and only to that extent.[2]

Footnotes

1 N.J.—Caparell v. Goodbody, 132 N.J. Eq. 559, 29 A.2d 563 (Ch. 1942).

2 Ohio—Chicago & E.R. Co. v. Keith, 67 Ohio St. 279, 65 N.E. 1020 (1902).
Substantive law

Wis.—Kayden Industries, Inc. v. Murphy, 34 Wis. 2d 718, 150 N.W.2d 447 (1967).

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§ 126. Validating existing laws and acts thereunder

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 633

A constitutional provision may ratify and validate a previously enacted statute, but the adoption of a constitutional provision that merely permits the enactment of a statute of a certain type does not of itself validate a statute that was void when enacted before the adoption.

Amendments to the state's constitution do not preserve all preexisting provisions of the amended portion of the constitution.[1] Instead, the very purpose and effect of an amendment is to amend the relevant portion of the constitution, effectively repealing and voiding any prior version of the particular section that was amended.[2] A constitutional provision may ratify and validate a previously enacted statute[3] but only if the intention to do so is clearly manifested.[4] An express ratification clause necessarily has a retroactive effect since it refers to what already has been done,[5] and the statute ratified is validated as of the date of its enactment.[6]

Generally, an act of a legislature that was not authorized by the constitution at the time of its passage is absolutely void and, if not reenacted, is not validated by a later amendment to the constitution or by the adoption of a new constitution that merely

permits the passage of such an act.[7] However, a constitutional provision whose language shows expressly (or by necessary implication) that it was intended to operate retrospectively by validating antecedent unconstitutional legislation renders valid all such legislation to which the constitutional provision relates, without the necessity for the legislature to reenact the laws,[8] unless the attempted validation would impair the obligations of a contract or divest vested rights.[9]

Footnotes

1 N.Y.—Baldwin Union Free School Dist. v. County of Nassau, 22 N.Y.3d 606, 986 N.Y.S.2d 1, 9 N.E.3d 351 (2014).

2 N.Y.—Baldwin Union Free School Dist. v. County of Nassau, 22 N.Y.3d 606, 986 N.Y.S.2d 1, 9 N.E.3d 351 (2014).

3 Minn.—State v. Luther, 56 Minn. 156, 57 N.W. 464 (1894).

4 N.H.—Trustees of Phillips Exeter Academy v. Exeter, 90 N.H. 472, 27 A.2d 569 (1940).

5 La.—Peck v. Tugwell, 199 La. 125, 5 So. 2d 524 (1941).
Retroactive operation of constitution, generally, see §§ 116 et seq.

6 La.—Peck v. Tugwell, 199 La. 125, 5 So. 2d 524 (1941).

7 Ga.—In In Interest of R. A. S., 249 Ga. 236, 290 S.E.2d 34 (1982).
Iowa—State v. Bates, 305 N.W.2d 426 (Iowa 1981).
Mont.—Bucher v. Powell County, 180 Mont. 145, 589 P.2d 660 (1979).
Neb.—Millennium Solutions, Inc. v. Davis, 258 Neb. 293, 603 N.W.2d 406 (1999).
N.M.—Fellows v. Shultz, 1970-NMSC-071, 81 N.M. 496, 469 P.2d 141 (1970).
Grant of power by constitution, generally, see §§ 140 et seq.

8 Ala.—Bonds v. State Dept. of Revenue, 254 Ala. 553, 49 So. 2d 280 (1950).

9 Ala.—Bonds v. State Dept. of Revenue, 254 Ala. 553, 49 So. 2d 280 (1950).

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§ 127. Statutes passed in anticipation of constitutional amendments

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 633

Statutes that are enacted in anticipation of the adoption, or the taking effect, of constitutional amendments, prescribing the manner of giving effect to those amendments, have been regarded as valid.

Statutes enacted in anticipation of the adoption,[1] or the taking effect, of constitutional amendments, prescribing the manner of giving effect to those amendments, have been regarded as valid.[2]

Footnotes

1 Ala.—Ex parte Southern Ry. Co., 556 So. 2d 1082 (Ala. 1989).
Mich.—Sessa v. State Treasurer, 117 Mich. App. 46, 323 N.W.2d 586 (1982).
N.M.—In re Thaxton, 1968-NMSC-014, 78 N.M. 668, 437 P.2d 129 (1968).
N.C.—In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

2 Mont.—General Agriculture Corp. v. Moore, 166 Mont. 510, 534 P.2d 859 (1975).

Enactment between adoption and taking effect

Ill.—People ex rel. City of Salem v. McMackin, 53 Ill. 2d 347, 291 N.E.2d 807 (1972).

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§ 128. Self-executing provisions, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640 to 651

Constitutional provisions are presumed to be self-executing, and they will be given effect without legislation unless a contrary intention is clearly expressed.

The framers of a constitution may provide that some of its provisions are self-executing.[1] Indeed, constitutional provisions are presumed to be self-executing,[2] and they will be given effect without legislation unless a contrary intention is clearly expressed.[3] If the constitutional provision is complete in itself, it executes itself.[4] When a constitutional mandate is not self-executing, it is for the legislature to implement the mandate.[5] A state constitutional provision that is self-executing must be obeyed unless obedience is impossible.[6]

The lack of a specific remedy should not itself defeat the contention that a constitutional provision is self-executing.[7] Additionally, since a constitution stands above legislative or judge-made law as an expression of the will of the people, the absence of legislative enabling statutes cannot be construed to nullify rights provided by the constitution if those rights are sufficiently specified.[8] Although constitutional provisions that are self-executing require no implementing legislation,

implementing legislation is permissible as long as it does not directly or indirectly impair, limit, or destroy the rights that the self-executing constitutional provision provides.[9]

A legislature may enact legislation to facilitate or assist in its operation if a constitutional provision is self-executing, but whatever legislation is adopted must be in harmony with and not in derogation of the provisions of the constitution.[10] In undertaking analysis of whether a decision for or against self-execution of constitutional provision harmonizes with the scheme of rights established in the constitution as a whole, the court looks to the text and history of the provision in question.[11]

Initiative petitions.

Although the right to propose constitutional amendments by petition is self-executing,[12] the constitution gives the legislature the power to determine precisely how the general mechanism for initiative and referendum will operate.[13]

Voting.

The right to vote granted by a constitution to persons having specified qualifications is self-executing[14] as is a constitutional provision disfranchising convicts.[15] A constitutional exception to universal suffrage may be expressly dependent upon legislative action.[16]

Suits against state.

Constitutional waivers of sovereign immunity,[17] and provisions authorizing or directing the legislature to provide for the manner and the courts in which a state will be sued, are generally regarded as not self-executing and as not operative, in the absence of supplemental or enabling legislation.[18]

Footnotes

1 Ga.—Birdsey v. Wesleyan College, 211 Ga. 583, 87 S.E.2d 378 (1955).
Kan.—State ex rel. Schneider v. Kennedy, 225 Kan. 13, 587 P.2d 844 (1978).
Mo.—State ex rel. St. Louis Fire Fighters Ass'n Local No. 73, AFL-CIO v. Stemmler, 479 S.W.2d 456 (Mo. 1972).
Ohio—Kraus v. City of Cleveland, 42 Ohio Op. 490, 58 Ohio L. Abs. 353, 94 N.E.2d 814 (C.P. 1950), decree aff'd by, 89 Ohio App. 504, 46 Ohio Op. 132, 58 Ohio L. Abs. 360, 96 N.E.2d 314 (8th Dist. Cuyahoga County 1950).
Divisible matters
Constitutional provisions that address divisible matters may be partially self-executing.
La.—Chamberlain v. State Through Dept. of Transp. and Development, 624 So. 2d 874 (La. 1993).
Municipal home rule
The Home-Rule Amendment that grants to municipalities authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws, is self-executing as the power of local self-government is inherent in all municipalities regardless of enabling legislation and the existence of municipal charters.
Ohio—State ex rel. Morrison v. Beck Energy Corp., 2013-Ohio-356, 989 N.E.2d 85 (Ohio Ct. App. 9th Dist. Summit County 2013), appeal allowed, 135 Ohio St. 3d 1469, 2013-Ohio-2512, 989 N.E.2d 70 (2013) and judgment aff'd, 2015-Ohio-485, 2015 WL 687475 (Ohio 2015).
Homestead exemption

A debtor need not claim the constitutional homestead exemption to obtain its protections as the provision is self-executing.

Fla.—Osborne v. Dumoulin, 55 So. 3d 577 (Fla. 2011).

2 Cal.—Bautista v. State, 201 Cal. App. 4th 716, 133 Cal. Rptr. 3d 909 (2d Dist. 2011).

Colo.—Davidson v. Sandstrom, 83 P.3d 648 (Colo. 2004).

N.Y.—Brown v. State, 89 N.Y.2d 172, 652 N.Y.S.2d 223, 674 N.E.2d 1129, 75 A.L.R.5th 769 (1996).

Okla.—Appeal of Crescent Precision Products Inc., 1973 OK 140, 516 P.2d 275 (Okla. 1973) (overruled on other grounds by, Oklahoma Independent Petroleum Ass'n v. Youngker, 1988 OK 146, 769 P.2d 109 (Okla. 1988)).

3 Cal.—Bautista v. State, 201 Cal. App. 4th 716, 133 Cal. Rptr. 3d 909 (2d Dist. 2011).

4 Colo.—Davidson v. Sandstrom, 83 P.3d 648 (Colo. 2004).

Detail required

A self-executing constitutional provision that gives rise to a cause of action should do more than express only general principles; it should describe the right in detail, including the means for its enjoyment and protection.

R.I.—Bandoni v. State, 715 A.2d 580 (R.I. 1998).

5 Ala.—Hornsby v. Sessions, 703 So. 2d 932 (Ala. 1997).

6 Colo.—Davidson v. Sandstrom, 83 P.3d 648 (Colo. 2004).

7 Vt.—In re Town Highway No. 20, 191 Vt. 231, 2012 VT 17, 45 A.3d 54 (2012).

8 Vt.—Shields v. Gerhart, 163 Vt. 219, 658 A.2d 924 (1995).

9 Cal.—Taylor v. Madigan, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1st Dist. 1975).

Colo.—Cacioppo v. Eagle County School Dist. Re-50J, 92 P.3d 453, 189 Ed. Law Rep. 354 (Colo. 2004).

Mich.—Newsome v. Riley, 69 Mich. App. 725, 245 N.W.2d 374 (1976).

Judicial remedies

Self-executing constitutional provisions generally do not preclude the legislature from prescribing judicial remedies.

Okla.—Muskogee Fair Haven Manor Phase I, Inc. v. Scott, 1998 OK 26, 957 P.2d 107 (Okla. 1998).

A self-executing constitutional provision may not be restricted by the legislature.

Ala.—Shell v. Jefferson County, 454 So. 2d 1331 (Ala. 1984).

10 Kan.—Hainline v. Bond, 250 Kan. 217, 824 P.2d 959, 72 Ed. Law Rep. 1113 (1992).

Ohio—In re Protest Filed by Citizens for Merit Selection of Judges, Inc., 49 Ohio St. 3d 102, 551 N.E.2d 150 (1990).

11 Vt.—In re Town Highway No. 20, 191 Vt. 231, 2012 VT 17, 45 A.3d 54 (2012).

12 Colo.—Committee for Better Health Care for All Colorado Citizens by Schrier v. Meyer, 830 P.2d 884 (Colo. 1992).

Fla.—State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561 (Fla. 1980).

Mich.—Wolverine Golf Club v. Hare (State Report Title: Wolverine Golf Club v. Secretary of State), 384 Mich. 461, 185 N.W.2d 392 (1971).

13 Utah—Bigler v. Vernon, 858 P.2d 1390 (Utah 1993).

14 Cal.—Fenton v. Groveland Community Services Dist., 135 Cal. App. 3d 797, 185 Cal. Rptr. 758 (5th Dist. 1982) (disapproved of on other grounds by, Katzberg v. Regents of University of California, 29 Cal. 4th 300, 127 Cal. Rptr. 2d 482, 58 P.3d 339, 171 Ed. Law Rep. 513 (2002)).

15 Cal.—Flood v. Riggs, 80 Cal. App. 3d 138, 145 Cal. Rptr. 573 (1st Dist. 1978).

16 Tenn.—Crutchfield v. Collins, 607 S.W.2d 478 (Tenn. Ct. App. 1980).

17 Ohio—Sheahan v. Department of Liquor Control, 44 Ohio App. 2d 393, 73 Ohio Op. 2d 520, 339 N.E.2d 840 (6th Dist. Lucas County 1974).

18 Ohio—Johns v. Univ. of Cincinnati Med. Assoc., Inc., 101 Ohio St. 3d 234, 2004-Ohio-824, 804 N.E.2d 19 (2004).

Neb.—Patteson v. Johnson, 219 Neb. 852, 367 N.W.2d 123 (1985).

Pa.—Brown v. Com., 453 Pa. 566, 305 A.2d 868 (1973).

Wyo.—Worthington v. State, 598 P.2d 796 (Wyo. 1979).

Conferring jurisdiction

A provision authorizing suit against a state in such courts as may be provided by law is inoperative until the enactment of legislation conferring jurisdiction upon particular courts.

Tenn.—Jones v. L & N R. Co., 617 S.W.2d 164 (Tenn. Ct. App. 1981).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

5. Self-Executing Provisions

§ 129. Test for whether constitutional provision is self-executing

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640 to 651

A constitutional provision must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.

A constitutional provision must articulate or supply a rule that is sufficient to give effect to the underlying rights and duties intended by the framers.[1] A constitutional provision must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.[2] In another test to determine whether a constitutional provision is self-executing, a court asks whether the constitution addresses the language to the courts or to the legislature; if addressed to the courts, it is self-executing.[3]

In determining whether a constitutional amendment is self-executing, it is crucially important to understand the intentions of the legislature in proposing the amendment.[4] The words of a self-executing constitutional provision are to be given the meaning

that the words imply to men of common understanding.[5] The fact that a provision is mandatory does not indicate that it is self-executing.[6]

Footnotes

1 Ohio—State v. Jackson, 102 Ohio St. 3d 380, 2004-Ohio-3206, 811 N.E.2d 68 (2004).
Utah—Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist., 2000 UT 87, 16 P.3d 533 (Utah 2000).
Vt.—Stevens v. Stearns, 175 Vt. 428, 2003 VT 74, 833 A.2d 835 (2003).

2 Cal.—Bautista v. State, 201 Cal. App. 4th 716, 133 Cal. Rptr. 3d 909 (2d Dist. 2011).

3 Mont.—Columbia Falls Elementary School Dist. No. 6 v. State, 2005 MT 69, 326 Mont. 304, 109 P.3d 257, 196 Ed. Law Rep. 958 (2005).
Utah—Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist., 2000 UT 87, 16 P.3d 533 (Utah 2000).

4 Kan.—Most Worshipful Grand Lodge of Ancient Free and Accepted Masons of Kansas v. Board of County Com'rs of County of Shawnee, 259 Kan. 510, 912 P.2d 708 (1996).
Legislative history
For a constitutional provision to be self-executing and thus give rise to a cause of action, the legislative history may be particularly informative as to the provision's intended operation.
R.I.—Bandoni v. State, 715 A.2d 580 (R.I. 1998).
Mandatory constitutional provisions, generally, see §§ 138 et seq.

5 Kan.—Kansas Enterprises, Inc. v. Frantz, 269 Kan. 436, 6 P.3d 857 (2000).

6 Cal.—Taylor v. Madigan, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1st Dist. 1975).
Mich.—Civil Service Commission v. Department of Administration of State, 324 Mich. 714, 37 N.W.2d 682 (1949).

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§ 130. Mere policy framework as insufficient

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640 to 651

Constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect.

The constitutional provision must contain more than a mere framework and must specifically provide for carrying the rights into effect,[1] without legislative action.[2] Thus, constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect[3] or of it appears from the language used and the circumstances of its adoption that later legislation was contemplated to carry it into effect.[4]

Footnotes

1 U.S.—Senra v. Town of Smithfield, 715 F.3d 34 (1st Cir. 2013) (needs rule for implementing right).
Conn.—State v. Gault, 304 Conn. 330, 39 A.3d 1105 (2012).

Utah—Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist., 2000 UT 87, 16 P.3d 533 (Utah 2000).

Vt.—In re Town Highway No. 20, 191 Vt. 231, 2012 VT 17, 45 A.3d 54 (2012).

2 Ark.—Knowlton v. Ward, 318 Ark. 867, 889 S.W.2d 721, 96 Ed. Law Rep. 831 (1994).

Ohio—In re Protest Filed by Citizens for Merit Selection of Judges, Inc., 49 Ohio St. 3d 102, 551 N.E.2d 150 (1990).

Vt.—In re Town Highway No. 20, 191 Vt. 231, 2012 VT 17, 45 A.3d 54 (2012).

3 U.S.—Senra v. Town of Smithfield, 715 F.3d 34 (1st Cir. 2013).

Cal.—Bautista v. State, 201 Cal. App. 4th 716, 133 Cal. Rptr. 3d 909 (2d Dist. 2011).

Haw.—Save Sunset Beach Coalition v. City and County of Honolulu, 102 Haw. 465, 78 P.3d 1 (2003).

Neb.—State ex rel. Lamm v. Nebraska Bd. of Pardons, 260 Neb. 1000, 620 N.W.2d 763 (2001).

Utah—Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist., 2000 UT 87, 16 P.3d 533 (Utah 2000).

Wis.—Schilling v. State Crime Victims Rights Bd., 2005 WI 17, 278 Wis. 2d 216, 692 N.W.2d 623 (2005).

4 Ala.—Associated Industries of Alabama, Inc. v. Britton, 371 So. 2d 904 (Ala. 1979).

Cal.—Bautista v. State, 201 Cal. App. 4th 716, 133 Cal. Rptr. 3d 909 (2d Dist. 2011) (state constitution granting the legislature plenary power to create and enforce a complete system of workers' compensation, by appropriate legislation).

Conn.—State v. Sanabria, 192 Conn. 671, 474 A.2d 760 (1984).

La.—State v. Gibson, 98 So. 3d 865 (La. 2012).

Mont.—Columbia Falls Elementary School Dist. No. 6 v. State, 2005 MT 69, 326 Mont. 304, 109 P.3d 257, 196 Ed. Law Rep. 958 (2005).

Ohio—State v. Williams, 88 Ohio St. 3d 513, 2000-Ohio-428, 728 N.E.2d 342 (2000).

Forfeiture of rights on conviction of public officer

Fla.—Williams v. Smith, 360 So. 2d 417 (Fla. 1978).

Amendments held not self-executing

(1) A constitutional amendment subjecting a legislative election contest to "judicial review as provided by law" was not self-executing and did not impliedly repeal existing statutory provisions requiring contests to be determined before the legislature.

N.D.—Timm v. Schoenwald, 400 N.W.2d 260 (N.D. 1987).

(2) A section of a state constitution enabling the legislature to exempt property from taxation by enactment of general legislation is not self-executing but merely grants to the legislature, acting within the constitutional limitations imposed, the authority to enact legislation to exempt property from taxation.

Ill.—City of Chicago v. Illinois Dept. of Revenue, 147 Ill. 2d 484, 168 Ill. Dec. 841, 590 N.E.2d 478 (1992).

(3) An amendment to a state constitution permitting state-owned lotteries is not self-executing; the legislature must enact statutes authorizing implementation of such forms of state-owned and operated gambling as it deems appropriate.

Kan.—State ex rel. Stephan v. Finney, 254 Kan. 632, 867 P.2d 1034 (1994).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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§ 131. Constitutional prohibitions or restrictions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640 to 651

Prohibitive and restrictive provisions are self-executing and may be enforced by the courts without the need for any legislative action unless it appears that the enactment of legislation is contemplated as a requisite to put them into effect.

Prohibitive and restrictive constitutional provisions are usually self-executing[1] and may be enforced by the courts without the need for any legislative action unless it clearly appears from a construction of the language of the entire provision and the circumstances of its adoption that the enactment of legislation is contemplated as requisite to put it into effect.[2] The absence of a penalty is one circumstance suggesting that a constitutional prohibition is not intended to be self-executing[3] but is not sufficient of itself to postpone the operation of a provision that all the circumstances suggest was intended to be self-operative.[4] In any event, the mere fact that a statute adds to or prescribes a penalty for violation of a constitutional provision does not indicate that the provision is not self-executing.[5]

Footnotes

1 Utah—Jensen ex rel. Jensen v. Cunningham, 2011 UT 17, 250 P.3d 465 (Utah 2011).

State bar on cruel or unusual punishment

A constitutional ban on cruel or unusual punishment was self-executing, and thus, it could not be curtailed by any undue burdens; the unambiguous proscription created a sufficient rule by means of which the right that it granted could be enjoyed and protected, and no further legislation was required to effectuate the ban.

Mich.—Rusha v. Dept. of Corrections, 307 Mich. App. 300, 859 N.W.2d 735 (2014).

2 Kan.—State ex rel. Schneider v. Kennedy, 225 Kan. 13, 587 P.2d 844 (1978).

La.—Godwin v. East Baton Rouge Parish School Bd., 372 So. 2d 1060 (La. Ct. App. 1st Cir. 1979), writ denied, 373 So. 2d 527 (La. 1979).

S.D.—Kneip v. Herseth, 87 S.D. 642, 214 N.W.2d 93 (1974).

Utah—Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist., 2000 UT 87, 16 P.3d 533 (Utah 2000) (prohibition of certain government conduct).

Va.—Robb v. Shockoe Slip Foundation, 228 Va. 678, 324 S.E.2d 674 (1985) (provisions that specifically prohibit particular conduct).

Prohibition on imprisonment for debt not self-executing

A state constitutional provision generally prohibiting imprisonment for debt is not self-executing but requires a legislative statute for implementation.

Colo.—Kinsey v. Preeson, 746 P.2d 542, 79 A.L.R.4th 213 (Colo. 1987).

3 Ohio—State v. Parker, 150 Ohio St. 22, 37 Ohio Op. 318, 80 N.E.2d 490 (1948).

4 Ohio—Kraus v. City of Cleveland, 89 Ohio App. 504, 46 Ohio Op. 132, 58 Ohio L. Abs. 360, 96 N.E.2d 314 (8th Dist. Cuyahoga County 1950).

5 Fla.—Schreiner v. McKenzie Tank Lines & Risk Management Services, Inc., 408 So. 2d 711 (Fla. 1st DCA 1982), decision approved, 432 So. 2d 567 (Fla. 1983).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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5. Self-Executing Provisions

§ 132. Constitutional prohibitions or restrictions —Taking property under power of eminent domain

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640 to 651

A constitutional prohibition against taking or damaging private property for public use without just compensation is usually self-executing even though the method of ascertaining such compensation is left for legislative determination.

A constitutional prohibition against taking or damaging private property for public use without just compensation generally is self-executing even though the method of ascertaining compensation is left for legislative determination;[1] it requires no legislation for its enforcement[2] and confers the right to obtain compensation regardless of an enabling statutory provision.[3] Neither consent to sue the State nor the creation of a remedy by legislative enactment is necessary to obtain relief for a violation of the constitutional provision.[4] Accordingly, when the constitution forbids taking of, or damage to, private property, and points out no remedy and no statute affords one, the common law will furnish the appropriate action for redress of the grievance.[5]

A constitutional prohibition against the taking of private property for public use without compensation may not be impaired by statute or ordinance[6] or by an act of any branch of the government.[7]

CUMULATIVE SUPPLEMENT

Cases:

Constitutional provision that allowed condemnees to recover necessary expenses was addressed to the courts, rather than the Legislature, and thus, was self-executing, and required no further legislative action. Mont. Const. art. 2, § 29. City of Missoula v. Mountain Water Company, 2018 MT 139, 391 Mont. 422, 419 P.3d 685 (2018), as corrected, (June 8, 2018).

[END OF SUPPLEMENT]

Footnotes

1 Ariz.—Calmat of Arizona v. State ex rel. Miller, 176 Ariz. 190, 859 P.2d 1323 (1993) (constitutional provision authorizing inverse-condemnation actions).
Cal.—Pacific Outdoor Advertising Co. v. City of Burbank, 86 Cal. App. 3d 5, 149 Cal. Rptr. 906 (2d Dist. 1978).
Miss.—Williams v. Walley, 295 So. 2d 286 (Miss. 1974).
Neb.—Kula v. Prososki, 219 Neb. 626, 365 N.W.2d 441 (1985) (state constitution's just-compensation provision).
Nev.—Alper v. Clark County, 93 Nev. 569, 571 P.2d 810 (1977).
N.H.—Sibson v. State, 111 N.H. 305, 282 A.2d 664 (1971).
Va.—Burns v. Board of Sup'rs of Fairfax County, 218 Va. 625, 238 S.E.2d 823 (1977).
Wash.—Deaconess Hospital v. State, 10 Wash. App. 475, 518 P.2d 216 (Div. 3 1974).

2 Cal.—Pacific Outdoor Advertising Co. v. City of Burbank, 86 Cal. App. 3d 5, 149 Cal. Rptr. 906 (2d Dist. 1978).
Fla.—Flatt v. City of Brooksville, 368 So. 2d 631 (Fla. 2d DCA 1979).
Ga.—C. F. I. Const. Co. v. Board of Regents of University System of Georgia, 145 Ga. App. 471, 243 S.E.2d 700 (1978).
Neb.—Kula v. Prososki, 219 Neb. 626, 365 N.W.2d 441 (1985).

3 Ariz.—Calmat of Arizona v. State ex rel. Miller, 176 Ariz. 190, 859 P.2d 1323 (1993).
Fla.—Flatt v. City of Brooksville, 368 So. 2d 631 (Fla. 2d DCA 1979).
Ill.—City of Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254, 217 N.E.2d 381 (1st Dist. 1965).
Nev.—Alper v. Clark County, 93 Nev. 569, 571 P.2d 810 (1977).
Wash.—Deaconess Hospital v. State, 10 Wash. App. 475, 518 P.2d 216 (Div. 3 1974).

4 Mo.—Bohannon v. Camden Bend Drainage Dist., 240 Mo. App. 492, 208 S.W.2d 794 (1948).
Neb.—Bordy v. State, 142 Neb. 714, 7 N.W.2d 632 (1943).
Waiver of immunity not involved
N.H.—Sibson v. State, 111 N.H. 305, 282 A.2d 664 (1971).

5 S.D.—Hurley v. State, 82 S.D. 156, 143 N.W.2d 722 (1966).
Va.—Burns v. Board of Sup'rs of Fairfax County, 218 Va. 625, 238 S.E.2d 823 (1977).

6 Ill.—Department of Public Works & Bldgs. v. Gorbe, 409 Ill. 211, 98 N.E.2d 730 (1951) (disapproved of on other grounds by, Department of Public Works and Buildings v. Butler Co., 13 Ill. 2d 537, 150 N.E.2d 124 (1958)).
N.C.—Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968).

7 Ill.—City of Chicago v. George F. Harding Collection, 70 Ill. App. 2d 254, 217 N.E.2d 381 (1st Dist. 1965).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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5. Self-Executing Provisions

§ 133. Protection of individual rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640 to 651

Constitutional provisions designed to guarantee or safeguard individual rights may be self-executing, and indeed, those found in bills of rights are usually considered self-executing.

Constitutional provisions designed to guarantee or safeguard individual rights may be self-executing.[1] Of this character are provisions that persons may not be deprived of any right because of racial or other discrimination.[2] The fact that a constitutional guarantee of rights is self-executing does not bar the legislature from enacting legislation to facilitate the exercise of the constitutional privileges and the enforcement of these protective rights.[3] In some jurisdictions, to recover monetary damages for a violation of the state constitution, a plaintiff must demonstrate that the provision violated by defendant is self-executing and then must establish three elements: (1) the plaintiff suffered a flagrant violation of his or her constitutional rights, (2) existing remedies do not redress the harm, and (3) equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff's rights or redress the harm.[4]

Constitutional provisions in bills of right are usually considered self-executing[5] even without the benefit of a declaration to that effect.[6] Thus, a constitutional provision guaranteeing a right to freedom of speech is self-executing.[7] Other self-executing constitutional provisions are the negative or prohibitive clauses of the Federal Constitution's Thirteenth,[8] Fourteenth,[9] and Fifteenth Amendments.[10] An amendment to the Federal Constitution that, by its terms, Congress may enforce by appropriate legislation—such as the Thirteenth or the Fourteenth Amendment—is self-executing only in fundamental but limited areas.[11]

Privacy.

A state constitutional provision which expresses an inalienable right to privacy is self-executing[12] without a need for further legislative implementation.[13]

Self-incrimination.

Constitutional guarantees against self-incrimination are not "self-executing" in that sense that the witness or suspect must invoke the protection.[14] However, a state constitutional provision that no person shall be prosecuted or be subject to any penalty or forfeiture on account of any matter with respect to which that person may be required to give testimony or produce evidence has been found to be self-executing.[15]

Search and seizure.

The search and seizure provision of a state constitution is self-executing; the provision defines judicially enforceable rights and provides citizens with a basis for judicial relief against the State if these rights are violated.[16]

Right to bear arms.

A state constitutional provision protecting an individual's right to bear arms is not self-executing and thus cannot be enforced without a supporting legislative enactment.[17]

CUMULATIVE SUPPLEMENT

Cases:

State constitutional provision prohibiting "the exchange of black lists by corporations, associations or person" is not self-executing, and thus would not support a private claim directly under that provision. Utah Const. art. 16, § 4. Harvey v. Ute Indian Tribe of Uintah and Ouray Reservation, 2017 UT 75, 416 P.3d 401 (Utah 2017).

[END OF SUPPLEMENT]

Footnotes

1 Ohio—Ex parte Berman, 86 Ohio App. 411, 42 Ohio Op. 13, 54 Ohio L. Abs. 327, 87 N.E.2d 716 (8th Dist. Cuyahoga County 1949).
Due process clause of state constitution is self-executing

Utah—Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist., 2000 UT 87, 16 P.3d 533 (Utah 2000).

Equal protection provision of state constitution is self-executing

N.Y.—Brown v. State, 89 N.Y.2d 172, 652 N.Y.S.2d 223, 674 N.E.2d 1129, 75 A.L.R.5th 769 (1996).

Inherent and inalienable rights as self-executing

(1) A state constitutional provision prohibiting the government from infringing upon the citizens' "inherent and inalienable" rights was self-executing.

Utah—Jensen ex rel. Jensen v. Cunningham, 2011 UT 17, 250 P.3d 465 (Utah 2011).

(2) A constitutional provision that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness" is self-executing.

U.S.—Harley v. Schuylkill County, 476 F. Supp. 191 (E.D. Pa. 1979).

2 Fla.—Schreiner v. McKenzie Tank Lines & Risk Management Services, Inc., 408 So. 2d 711 (Fla. 1st DCA 1982), decision approved, 432 So. 2d 567 (Fla. 1983).

Employment discrimination

The self-executing provision of an employment discrimination section of a constitution simply makes clear that inaction by the legislature or the repeal of any implementing legislation would not serve to defeat the section's substantive rights, but the provision does not operate where the General Assembly has acted.

Ill.—Baker v. Miller, 159 Ill. 2d 249, 201 Ill. Dec. 119, 636 N.E.2d 551 (1994).

Denial of common benefits

The common benefits clause of Vermont Constitution was self-executing, even though it did not provide a private remedy for discriminatory treatment, as the lack of a specific remedy did not itself defeat the contention that it was self-executing, since the clause expressed a fundamental right that government was created to benefit all of the people and that preferential treatment for any single person, family, or set of persons was prohibited, which afforded citizens the right to challenge perceived partiality by a governmental entity, and ensured the vigorous protection for the community compact that was the heart of government so that a private right of action under the clause did no harm to the framework of protections laid out in the constitution.

Vt.—In re Town Highway No. 20, 191 Vt. 231, 2012 VT 17, 45 A.3d 54 (2012).

3 Me.—State v. Bachelder, 403 A.2d 754 (Me. 1979).

4 Utah—Jensen ex rel. Jensen v. Cunningham, 2011 UT 17, 250 P.3d 465 (Utah 2011).

5 Va.—Robb v. Shockoe Slip Foundation, 228 Va. 678, 324 S.E.2d 674 (1985).

6 Va.—Robb v. Shockoe Slip Foundation, 228 Va. 678, 324 S.E.2d 674 (1985).

7 N.C.—Corum v. University of North Carolina Through Bd. of Governors, 330 N.C. 761, 413 S.E.2d 276, 72 Ed. Law Rep. 652 (1992).

Vt.—Pease v. Windsor Development Review Bd., 190 Vt. 639, 2011 VT 103, 35 A.3d 1019 (2011) (under state constitutional).

8 U.S.—Jordan v. Lewis Grocer Co., 467 F. Supp. 113 (N.D. Miss. 1979).

N.Y.—People v. Lavender, 48 N.Y.2d 334, 422 N.Y.S.2d 924, 398 N.E.2d 530 (1979).

S.C.—Ex parte Hollman, 79 S.C. 9, 60 S.E. 19 (1908).

9 U.S.—PG Pub. Co. v. Aichele, 902 F. Supp. 2d 724 (W.D. Pa. 2012), decision aff'd on other grounds, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013).

Cal.—People v. Davis, 226 Cal. App. 4th 1353, 172 Cal. Rptr. 3d 714 (1st Dist. 2014), as modified on denial of reh'g, (July 8, 2014) and review denied, (Aug. 13, 2014) (*Brady* violations).

Minn.—Payne v. Lee, 222 Minn. 269, 24 N.W.2d 259 (1946).

10 U.S.—State of S.C. v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) (abrogated on other grounds by, Shelby County, Ala. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013)); Apache County v. U. S., 256 F. Supp. 903 (D. D.C. 1966).

11 U.S.—Oliver v. Donovan, 293 F. Supp. 958 (E.D. N.Y. 1968).

12 Alaska—State v. Planned Parenthood of Alaska, 35 P.3d 30 (Alaska 2001).

Cal.—Gunn v. Employment Development Dept., 94 Cal. App. 3d 658, 156 Cal. Rptr. 584 (2d Dist. 1979).

13 Alaska—State v. Planned Parenthood of Alaska, 35 P.3d 30 (Alaska 2001).

14 U.S.—Adams v. State of Md., 347 U.S. 179, 74 S. Ct. 442, 98 L. Ed. 608 (1954) (no statute need to obtain protection against self-incrimination).
U.S.—Roberts v. U. S., 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980); Koch v. City of Del City, 660 F.3d 1228 (10th Cir. 2011).
Mass.—Com. v. Harvey, 397 Mass. 351, 491 N.E.2d 607 (1986) (state constitutional privilege against self-incrimination).

15 Ariz.—State v. Chitwood, 73 Ariz. 314, 240 P.2d 1202 (1952).

16 N.Y.—Brown v. State, 89 N.Y.2d 172, 652 N.Y.S.2d 223, 674 N.E.2d 1129, 75 A.L.R.5th 769 (1996).

17 U.S.—Northrup v. City of Toledo Police Div., 2014 WL 4925052 (N.D. Ohio 2014).

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5. Self-Executing Provisions

§ 134. Courts and civil procedure

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640 to 651

A constitutional provision concerning courts is usually self-executing unless it merely authorizes or requires the legislature to act.

A constitutional amendment effecting a merger of courts is self-executing if no legislation is necessary to give effect to its provisions,[1] but an amendment authorizing the legislature to consolidate specified courts does not, ipso facto, consolidate them.[2] A constitutional provision relating to a matter of procedure may be self-executing[3] unless it depends on legislative action to make it complete or to provide enforcement mechanisms.[4] A constitutional provision authorizing the court to comment on the evidence is self-executing[5] and so is a provision requiring that all judicial proceedings be conducted in the English language.[6]

Jurisdiction.

A constitutional provision fixing the jurisdiction of a court is usually self-executing and operates without legislative action if it is explicit in meaning, mandatory in character, and complete in itself.[7] Some constitutional provisions conferring jurisdiction

on particular courts are not self-executing, including those conferring such jurisdiction "as may be provided by law,"[8] as well as various provisions dealing with appellate or supervisory jurisdiction.[9]

The provision of the Federal Constitution giving the Supreme Court of the United States original jurisdiction in a class of cases specified and appellate jurisdiction in all other cases to which the judicial power of the United States extends[10] is self-executing.[11] The provision extending the judicial power to all cases in law and equity arising under the Constitution and laws of the United States[12] is not, however, self-executing as to the inferior federal courts.[13]

Trial by jury.

The provision of the Seventh Amendment of the Federal Constitution preserving the right of trial by jury in suits at common law is not self-executing,[14] and the same is true of state constitutional provisions that guarantee the right to a jury trial[15] or address the drawing of the jury panel.[16]

Footnotes

1 W. Va.—State ex rel. Casey v. Pauley, 158 W. Va. 298, 210 S.E.2d 649 (1975).

2 Ark.—Mills v. Latham, 215 Ark. 128, 219 S.W.2d 609 (1949).

3 Mo.—Sharp v. National Biscuit Co., 179 Mo. 553, 78 S.W. 787 (1904).

Right of appeal

(1) A section of a constitution providing for the judicial review of decisions of administrative bodies is self-enforcing.

Mo.—Scott v. Wheelock Bros., 357 Mo. 480, 209 S.W.2d 149 (1948).

(2) Constitutional provisions preserving the right of a landowner to appeal in condemnation proceedings is self-operating.

Ky.—Barker v. Lannert, 310 Ky. 843, 222 S.W.2d 659 (1949).

Scope of review

A constitutional provision that review of administrative decisions should consider whether the findings of the administrative body are supported by the evidence is mandatory and requires no legislation to be put into effect. Brooks v. General Motors Assembly Division, 527 S.W.2d 50 (Mo. Ct. App. 1975).

4 Cal.—Capron v. Van Horn, 201 Cal. 486, 258 P. 77 (1927).

Appeal

Specific legislation was required to enable the state to appeal from the dismissal of a misdemeanor charge premised on a lack of a speedy trial as the provision of the state constitution that authorizes circuit courts to exercise appellate jurisdiction over corporation courts was not self-executing and did not give the state an unqualified right to appeal from the municipal court to the circuit court.

Ark.—State v. Bostick, 313 Ark. 596, 856 S.W.2d 12 (1993).

5 Cal.—Rivera v. Goodenough, 71 Cal. App. 2d 223, 162 P.2d 498 (1st Dist. 1945).

6 Ill.—Saline Branch Drainage Dist. v. Urbana-Champaign Sanitary Dist., 395 Ill. 26, 69 N.E.2d 251, 167 A.L.R. 1210 (1946).

7 N.M.—In re Conley's Will, 1954-NMSC-112, 58 N.M. 771, 276 P.2d 906 (1954).

Ohio—Jelm v. Jelm, 155 Ohio St. 226, 44 Ohio Op. 246, 98 N.E.2d 401, 22 A.L.R.2d 1300 (1951).

8 N.D.—State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977).

Ohio—Harris v. Alvis, 61 Ohio L. Abs. 311, 104 N.E.2d 182 (Ct. App. 2d Dist. Franklin County 1950).

9 Cal.—People v. Cowan, 38 Cal. App. 2d 144, 100 P.2d 1079 (1st Dist. 1940).

Or.—State v. Briggs, 245 Or. 503, 420 P.2d 71 (1966).

Wash.—State ex rel. Northwestern Elec. Co. v. Superior Court for Clark County, 27 Wash. 2d 694, 179 P.2d 510 (1947).

10 U.S. Const. Art. III, § 2, cl. 2.

11 U.S.—Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority, 667 F.2d 1327 (11th Cir. 1982).

12 U.S. Const. Art. III, § 2, cl. 1.

13 U.S.—People of State of California ex rel. McColgan v. Bruce, 129 F.2d 421, 147 A.L.R. 782 (C.C.A. 9th Cir. 1942).

14 U.S.—U.S. v. 86.6 Acres of Land in Merrimack County, N.H., 44 F. Supp. 495 (D.N.H. 1942).

15 Ohio—Bright v. Curry, 35 Ohio Misc. 51, 64 Ohio Op. 2d 189, 300 N.E.2d 470 (Mun. Ct. 1973).

16 Ariz.—Coca Cola Bottling Co. of Flagstaff v. Jones, 74 Ariz. 393, 250 P.2d 586 (1952).

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§ 135. Judges

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640 to 651

A constitutional provision fixing the number of members of a court is usually self-executing and effective without legislative action, but a provision that an additional judge may be authorized if the population of a county exceeds a specified figure is not self-executing.

A constitutional provision fixing the number of members of a court is usually self-executing and effective without legislative action,[1] but a provision that an additional judge may be authorized if the population of a county exceeds a specified figure is not self-executing[2] nor are provisions for appointing judges in a manner prescribed by law,[3] or authorizing the election of judges,[4] or a mandatory state constitutional provision stating that the term of office for all judges of the state judicial system is a certain number of years.[5] However, provisions authorizing judges to hold court in circuits, districts, or counties other than their own are usually self-executing and effective without legislation.[6]

Footnotes

1 Va.—Allen v. Byrd, 151 Va. 21, 144 S.E. 469 (1928).

Number of magistrates

Mo.—State ex rel. Randolph County v. Walden, 357 Mo. 167, 206 S.W.2d 979 (1947).

2 Ariz.—Collins v. Krucker, 56 Ariz. 6, 104 P.2d 176 (1940).

3 Conn.—State ex rel. Cotter v. Leipner, 138 Conn. 153, 83 A.2d 169 (1951).

4 N.Y.—Spillane v. Katz, 25 N.Y.2d 34, 302 N.Y.S.2d 546, 250 N.E.2d 44 (1969).

Judicial nominating committee

A constitutional provision for a nominating committee to fill a vacancy in the office of a judge was not self-executing in that it was inoperative until the judicial nominating committee was established by law to supply a list of candidates from which the governor could choose an appointee.

N.M.—State ex rel. Vogel v. Garaas, 261 N.W.2d 914 (N.D. 1978).

5 Ala.—Hornsby v. Sessions, 703 So. 2d 932 (Ala. 1997).

Mandatory constitutional provisions, generally, see §§ 138 et seq.

6 Mo.—Pogue v. Swink, 364 Mo. 306, 261 S.W.2d 40 (1953).

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§ 136. Crimes and criminal procedure

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640 to 651

Provisions relating to matters of criminal procedure may be self-executing, or they may merely authorize legislation; provisions relating to such items as grand juries, right to counsel, and cruel and unusual punishments have been held to be self-executing although other provisions have been held not to be self-executing.

A constitutional provision will not support an indictment for its violation unless the provision is implemented by legislation or the common law.[1] Provisions relating to matters of criminal procedure may be self-executing,[2] or they may merely authorize legislation.[3] Sometimes, criminal justice provisions are inoperative until a statute has been enacted to carry them into effect.[4] The speedy trial provision of the Federal Constitution has been recognized as being self-executing[5] as have similar provisions in state constitutions.[6] On the other hand, a provision giving the court authority to suspend sentence under conditions prescribed by the legislature is not self-executing.[7]

Grand juries.

Provisions of a state constitution concerning grand juries are self-executing and require no legislative act to carry them into effect.[8]

Extradition.

The provision of the Federal Constitution providing for the extradition of a fugitive from justice is not self-executing.[9]

Right to counsel.

The constitutional right to counsel in a criminal case is self-executing.[10]

Cruel and unusual punishment.

The cruel and unusual punishment provision of a state constitution is a self-executing provision that prohibits specific evils that can be remedied without implementing legislation.[11]

Footnotes

1 W. Va.—State v. Wolfe, 128 W. Va. 414, 36 S.E.2d 849 (1946).

2 N.Y.—In re Telephone Communications, 55 Misc. 2d 163, 284 N.Y.S.2d 431 (Sup 1967) (wiretap orders).

Appellate jurisdiction

Cal.—People v. Hawes, 129 Cal. App. 3d 930, 181 Cal. Rptr. 456 (3d Dist. 1982).

3 Haw.—State v. Pilago, 65 Haw. 22, 649 P.2d 363 (1982).

Jurisdiction

Ga.—J. W. A. v. State, 233 Ga. 683, 212 S.E.2d 849 (1975).

S.C.—State v. Blanding, 264 S.C. 37, 212 S.E.2d 256 (1975).

4 Nev.—Ryan v. Eighth Judicial Dist. Court In and For Clark County, 88 Nev. 638, 503 P.2d 842 (1972).

Compulsory process

A state constitutional provision to the effect that in all criminal prosecutions the accused has the right to have compulsory process for obtaining favorable witnesses has been held to be not self-executing as far as convicts are concerned.

Ala.—Magee v. State, 43 Ala. App. 218, 187 So. 2d 274 (1966).

Probable cause hearing for certain crimes

A constitutional amendment providing that all defendants charged with a crime punishable by death or life imprisonment must be accorded a probable cause hearing could not take effect until hearing procedures were prescribed, in view of the fact that the procedures that attend the right to a probable cause hearing are integral parts of the right itself.

Conn.—State v. Sanabria, 192 Conn. 671, 474 A.2d 760 (1984).

Appeal

An article of a constitution conferring upon a state the right to appeal any adverse order of a circuit court is not self-executing, and thus the State does not have a right of appeal from a final judgment in a criminal case the same as any other party litigant except if the appeal would be futile under principles of double jeopardy.

Fla.—State v. Jones, 488 So. 2d 527 (Fla. 1986).

Victims' rights amendments to state constitutions

R.I.—Bandoni v. State, 715 A.2d 580 (R.I. 1998).

Wis.—Schilling v. State Crime Victims Rights Bd., 2005 WI 17, 278 Wis. 2d 216, 692 N.W.2d 623 (2005).

5 Ga.—Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Md.—State v. Long, 1 Md. App. 326, 230 A.2d 119 (1967).

6 Cal.—Sykes v. Superior Court, 9 Cal. 3d 83, 106 Cal. Rptr. 786, 507 P.2d 90 (1973).

Ga.—Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967).
Idaho—Jacobson v. Winter, 91 Idaho 11, 415 P.2d 297 (1966).
7 Tex.—McNew v. State, 608 S.W.2d 166 (Tex. Crim. App. 1978).
8 Okla.—State v. Bezdicek, 2002 OK CR 28, 53 P.3d 917 (Okla. Crim. App. 2002).
9 U.S.—U.S. ex rel. Silver v. O'Brien, 138 F.2d 217 (C.C.A. 7th Cir. 1943).
Ark.—Gulley v. Apple, 213 Ark. 350, 210 S.W.2d 514 (1948).
Ill.—People ex rel. Abeles v. Elrod, 27 Ill. App. 3d 155, 326 N.E.2d 443 (1st Dist. 1975).
Mo.—State ex rel. Taylor v. Blair, 358 Mo. 345, 214 S.W.2d 555 (1948).
10 Ind.—Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951).
11 Utah—State v. Lafferty, 2001 UT 19, 20 P.3d 342 (Utah 2001).

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§ 137. Effect on existing laws

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 630 to 633, 640 to 651

Prior laws are not usually affected or repealed by a constitutional provision that is not self-executing, but a constitutional provision may be so framed that although legislation is necessary to put into effect its affirmative principles, it repeals existing statutes that are inconsistent with it.

Before an enactment of the legislature putting it into effect, a constitutional provision that is not self-executing does not usually repeal or otherwise affect existing constitutional provisions, statutes, or ordinances.[1] Instead, these constitutional provisions, statutes, or ordinances ordinarily remain in force until the necessary legislation is enacted.[2]

A constitutional provision may be so framed, however, that although legislation is necessary to put into effect its affirmative principles, it repeals existing statutes that are inconsistent with it.[3]

Footnotes

1 Ala.—Opinion of the Justices, 251 Ala. 96, 36 So. 2d 480 (1948).
N.D.—State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977).
Superseding laws previously in force, generally, see §§ 125 et seq.
Principle as rule of construction
Conn.—State ex rel. Cotter v. Leipner, 138 Conn. 153, 83 A.2d 169 (1951).

2 Ga.—DeKalb County v. Allstate Beer, Inc., 229 Ga. 483, 192 S.E.2d 342 (1972).

3 Ga.—St. John's Melkite Catholic Church v. Commissioner of Revenue, 240 Ga. 733, 242 S.E.2d 108 (1978) (a constitutional amendment legalizing the operation of nonprofit bingo games eliminated a prohibition of bingo implicit in a statute outlawing lotteries).
Factors in determination
Repugnancy, inconsistency, and conflict between state statutes and self-executing constitutional provisions are basic factors in determining whether these statutes are repealed by implication when a self-executing state constitutional provision is adopted.
N.D.—State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977).

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6. Mandatory and Directory Provisions

§ 138. Mandatory and directory provisions, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 619

The provisions of a state constitution—as the organic and fundamental law of the land—stand upon a higher plane than statutes and will ordinarily be deemed mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required.

The provisions of a state constitution—as the organic and fundamental law of the land—stand upon a higher plane than statutes and will ordinarily be deemed mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required.[1] Under this principle, restrictions and prohibitions in constitutional provisions are mandatory and must be obeyed.[2] Constitutional provisions are to be construed as mandatory unless a different intention is manifested either by express provision or by necessary implication.[3] Usually, therefore, constitutional provisions are mandatory rather than directory,[4] and there are expressions to the effect that all constitutional provisions are mandatory.[5]

The word "shall"[6] or "ought" as used in a constitutional provision is usually imperative or mandatory.[7] Although generally the use of the word "shall" in constitutions limits or prevents exercise of discretion, its use is not conclusive in determining whether

they are mandatory or directory.[8] The word "may" does not necessarily have a permissive import but sometimes means "shall" or "must"[9] although it has been held to have a permissive meaning rather than mandatory or prohibitory.[10]

Mandatory constitutional provisions are binding on all departments of the government,[11] and long usage cannot repeal them or justify their violation.[12] Furthermore, disobedience or evasion is not permissible even if it appears that the best interests of the public might be promoted in some respects.[13]

Whenever a constitutional provision is plain and unambiguous, it is mandatory, and courts are bound to obey it.[14] Generally, constitutional provisions are mandatory and must be followed if they designate in express terms the time or manner of doing particular acts and are silent about performance in any other manner.[15] When a constitutional provision contemplates that implementing legislation will be enacted, the provision should—absent clear language to the contrary—be interpreted as establishing general guidelines for the forthcoming legislation rather than mandatory directives as to its content.[16]

Discretionary authority vested in legislature.

Constitutional provisions are directory if discretionary authority over the matter is left with the legislature to determine.[17]

Footnotes

1 W. Va.—State ex rel. West Virginia Citizen Action Group v. Tomblin, 227 W. Va. 687, 715 S.E.2d 36 (2011).

2 Colo.—Yenter v. Baker, 126 Colo. 232, 248 P.2d 311 (1952).
Restrictions and prohibitions in constitutional provisions as self-executing, see § 131.

3 Ariz.—Schock v. Jacka, 105 Ariz. 131, 460 P.2d 185 (1969).
Mo.—State ex rel. Scott v. Kirkpatrick, 484 S.W.2d 161 (Mo. 1972).
Pa.—Middle Paxton Township v. Borough of Dauphin, 10 Pa. Commw. 431, 308 A.2d 208 (1973), order aff'd, 458 Pa. 396, 326 A.2d 342 (1974).
Wash.—State ex rel. Anderson v. Chapman, 86 Wash. 2d 189, 543 P.2d 229 (1975).
Mandatory constitutional provisions as not necessarily self-executing, see § 128.
Essential provisions of constitution as mandatory
Fla.—Thomas v. State ex rel. Cobb, 58 So. 2d 173, 34 A.L.R.2d 140 (Fla. 1952).

4 Ala.—Hornsby v. Sessions, 703 So. 2d 932 (Ala. 1997).
S.C.—Byrd v. Lawrimore, 212 S.C. 281, 47 S.E.2d 728 (1948).
Wash.—State ex rel. Billington v. Sinclair, 28 Wash. 2d 575, 183 P.2d 813 (1947).

5 Ariz.—Stillman v. Marston, 107 Ariz. 208, 484 P.2d 628 (1971).
Wash.—State v. Reader's Digest Ass'n, Inc., 81 Wash. 2d 259, 501 P.2d 290 (1972) (holding modified on other grounds by, Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash. 2d 778, 719 P.2d 531 (1986)).

6 Ala.—Hornsby v. Sessions, 703 So. 2d 932 (Ala. 1997).
Mich.—Petition of Highway US-24, in Bloomfield Tp., Oakland County, 392 Mich. 159, 220 N.W.2d 416 (1974).
Okla.—Oklahoma Elec. Co-op., Inc. v. Oklahoma Gas and Elec. Co., 1999 OK 35, 982 P.2d 512 (Okla. 1999), as corrected, (May 5, 1999).
W. Va.—State ex rel. West Virginia Citizen Action Group v. Tomblin, 227 W. Va. 687, 715 S.E.2d 36 (2011).

7 Wash.—State ex rel. Billington v. Sinclair, 28 Wash. 2d 575, 183 P.2d 813 (1947).

8 W. Va.—Canyon Public Service Dist. v. Tasa Coal Co., 156 W. Va. 606, 195 S.E.2d 647 (1973).

9 Wash.—State ex rel. Billington v. Sinclair, 28 Wash. 2d 575, 183 P.2d 813 (1947).

10 Cal.—Dean v. Kuchel, 37 Cal. 2d 97, 230 P.2d 811 (1951).

Ga.—Williamson v. Schmid, 237 Ga. 630, 229 S.E.2d 400 (1976).

Permission and power

In constitutional provisions, the word "may" generally should be read as conferring both permission and power.

W. Va.—State ex rel. Trent v. Sims, 138 W. Va. 244, 77 S.E.2d 122 (1953).

11 Cal.—Katzberg v. Regents of University of California, 29 Cal. 4th 300, 127 Cal. Rptr. 2d 482, 58 P.3d 339, 171 Ed. Law Rep. 513 (2002).

N.J.—State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972).

Wash.—State ex rel. Billington v. Sinclair, 28 Wash. 2d 575, 183 P.2d 813 (1947).

12 Wash.—State ex rel. Billington v. Sinclair, 28 Wash. 2d 575, 183 P.2d 813 (1947).

13 Ga.—Woodside v. City of Atlanta, 214 Ga. 75, 103 S.E.2d 108 (1958).

N.Y.—Sokolove v. Board of Ed. of City of New York, 176 Misc. 1016, 29 N.Y.S.2d 581 (Sup 1941).

Wash.—State ex rel. Billington v. Sinclair, 28 Wash. 2d 575, 183 P.2d 813 (1947).

14 Ala.—Hornsby v. Sessions, 703 So. 2d 932 (Ala. 1997).

15 Ky.—Gaines v. O'Connell, 305 Ky. 397, 204 S.W.2d 425 (1947).

N.M.—State ex rel. Wood v. King, 1979-NMSC-106, 93 N.M. 715, 605 P.2d 223 (1979).

Pa.—Zemprelli v. Thornburg, 47 Pa. Commw. 43, 407 A.2d 102 (1979).

16 Pa.—School Districts of Deer Lakes and Allegheny Valley v. Kane, 463 Pa. 554, 345 A.2d 658 (1975).

17 Kan.—State ex rel. Fatzer v. Board of Regents of State of Kan., 167 Kan. 587, 207 P.2d 373 (1949).

Pa.—Zemprelli v. Thornburg, 47 Pa. Commw. 43, 407 A.2d 102 (1979).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

6. Mandatory and Directory Provisions

§ 139. Duty of legislature; compelling performance

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 655, 658, 2340

Although the legislature is bound by the mandatory provisions of a constitution, there is no remedy if the legislature fails to perform in accordance with the mandate.

Although the legislature is bound or concluded by the mandatory provisions of a constitution,[1] and it is under an obligation to perform the duties and discharge the functions imposed on it by the constitution in accordance with its mandate,[2] if the legislature fails to do so, and neglects or refuses to pass legislation as required by a mandatory constitutional provision, there is no remedy available to compel performance.[3]

Footnotes

1 Colo.—Passarelli v. Schoettler, 742 P.2d 867 (Colo. 1987).
Mont.—Noll v. City of Bozeman, 166 Mont. 504, 534 P.2d 880 (1975).
Va.—Gill v. Nickels, 197 Va. 123, 87 S.E.2d 806 (1955).

2 Colo.—People v. New Horizons, Inc., 200 Colo. 377, 616 P.2d 106 (1980).
Mich.—Anchor Bay Concerned Citizens v. People ex rel. Kelley, 55 Mich. App. 428, 223 N.W.2d 3 (1974).
N.D.—State ex rel. Vogel v. Garaas, 261 N.W.2d 914 (N.D. 1978).
S.C.—Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92 (1976).

3 Neb.—State ex rel. Walker v. Board of Com'rs for Educational Lands and Funds, 141 Neb. 172, 3 N.W.2d 196 (1942).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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B. Operation and Effect

7. Grant or Limitation of Powers

a. In General

§ 140. Grant or limitation of powers, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 639, 2340

Since the supreme authority or sovereignty resides in the people, they generally can withhold, grant, or withdraw governmental powers; powers not granted to the United States or prohibited to the states are reserved to the states or to the people.

The supreme authority, or sovereignty, resides ultimately in the people.[1] They are the source of all governmental and political powers[2] and may, at their pleasure, withhold those powers, distribute them among various departments for purposes of government, or withdraw them.[3] In other words, a constitution is a compact between a government and the people in which the people delegate authority to the government, and the authority of government is prescribed.[4] A declared legislative policy can never rise above a constitutional grant or ignore a constitutional limitation on its powers.[5]

In view of the doctrine that the United States is a government of delegated powers—and of the Tenth Amendment providing that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people—powers not so delegated nor prohibited are reserved to the states or to the people.[6]

Footnotes

1 Ky.—Holsclaw v. Stephens, 507 S.W.2d 462 (Ky. 1973) (disapproved of on other grounds by, Jacobs v. Lexington-Fayette Urban County Government, 560 S.W.2d 10 (Ky. 1977)).
La.—Louisiana Federation of Teachers v. State, 118 So. 3d 1033, 296 Ed. Law Rep. 666 (La. 2013).
Md.—Smith v. Higinbothom, 187 Md. 115, 48 A.2d 754 (1946).
Mich.—Millard v. Guy, 334 Mich. 694, 55 N.W.2d 210 (1952).
Neb.—Ramsey v. Gage County, 153 Neb. 24, 43 N.W.2d 593 (1950).
N.C.—Dickson v. Rucho, 366 N.C. 332, 737 S.E.2d 362 (2013).

2 Wash.—State ex rel. Linn v. Superior Court for King County, 20 Wash. 2d 138, 146 P.2d 543 (1944).

3 Fla.—State ex rel. Fraser v. Gay, 158 Fla. 465, 28 So. 2d 901 (1947).

4 Tex.—Republican Party of Texas v. Dietz, 940 S.W.2d 86 (Tex. 1997).

5 Ariz.—City of Tucson v. Polar Water Co., 76 Ariz. 126, 259 P.2d 561 (1953), opinion modified on other grounds on reh'g, 76 Ariz. 404, 265 P.2d 773 (1954).

6 U.S.—Knapp v. Schweitzer, 357 U.S. 371, 78 S. Ct. 1302, 2 L. Ed. 2d 1393 (1958) (overruled in part on other grounds by, Murphy v. Waterfront Com'n of New York Harbor, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964)).
Ohio—City of Cleveland v. Piskura, 145 Ohio St. 144, 30 Ohio Op. 340, 60 N.E.2d 919 (1945).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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B. Operation and Effect

7. Grant or Limitation of Powers

a. In General

§ 141. Federal and state constitutions distinguished

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 639, 2340

The Federal Constitution is distinguishable from state constitutions in that the former is regarded as primarily a grant of power whereas state constitutions are usually regarded not as grants but as limitations or reservations of power.

Unlike the Federal Constitution, a state constitution is usually regarded as a limitation or restriction of power and not as a grant or delegation of power.

The Federal Constitution may restrict state governments, but when these prohibitions are not implicated, state governments do not need constitutional authorization to act.[1] The states thus can and do perform many of the vital functions of modern government, such as punishing street crime, running public schools, and zoning property for development, even though the Federal Constitution's text does not authorize any government to do so.[2] The Federal Constitution is distinguishable from state constitutions in that the former is regarded as primarily a grant of power whereas state constitutions are usually regarded not as grants of power but as limitations[3] or reservations,[4] at least insofar as the state constitution affects the legislative power.[5]

A significant difference between federal and state courts is that, unlike state courts, federal courts do not presume that Congress intended for the common law to apply when interpreting a statute.[6]

Footnotes

1 U.S.—National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012).

2 U.S.—National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012).

3 Cal.—Way v. Superior Court, 74 Cal. App. 3d 165, 141 Cal. Rptr. 383 (3d Dist. 1977).
La.—Radiofone, Inc. v. City of New Orleans, 630 So. 2d 694 (La. 1994).
Mont.—Board of Regents of Higher Ed. v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975).
Mo.—Americans United v. Rogers, 538 S.W.2d 711 (Mo. 1976).
N.J.—Gilbert v. Gladden, 87 N.J. 275, 432 A.2d 1351 (1981).
N.D.—State v. Ertelt, 548 N.W.2d 775 (N.D. 1996).
Ohio—State v. Warner, 55 Ohio St. 3d 31, 564 N.E.2d 18 (1990).
R.I.—Kennedy v. State, 654 A.2d 708 (R.I. 1995).
Wash.—State v. Foster, 135 Wash. 2d 441, 957 P.2d 712 (1998).
Grant or limitation of powers under the Federal Constitution, see §§ 142 et seq.
Grant or limitation of powers under a state constitution, see §§ 147 et seq.

4 U.S.—U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).
Cal.—Tetreault v. Franchise Tax Bd., 255 Cal. App. 2d 277, 63 Cal. Rptr. 326 (1st Dist. 1967).

5 N.J.—Behnke v. New Jersey Highway Authority, 13 N.J. 14, 97 A.2d 647 (1953).
Wash.—Union High School Dist. No. 1, Skagit County v. Taxpayers of Union High School Dist. No. 1 of Skagit County, 26 Wash. 2d 1, 172 P.2d 591 (1946).

6 N.M.—Chan v. Montoya, 150 N.M. 44, 2011-NMCA-072, 256 P.3d 987 (Ct. App. 2011).

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7. Grant or Limitation of Powers

b. Federal Constitution

§ 142. Federal constitutional grants and limitations, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 2330 to 2333, 2340 to 2342

The Federal Constitution is a grant or delegation of power, and the federal government possesses only those powers expressly implicitly conferred by the Constitution.

The federal government, with respect to internal affairs, derives its authority from the Federal Constitution.[1] The Federal Constitution is a grant or delegation of power,[2] and in general, the federal government is one of enumerated and delegated powers[3] and possesses only those powers expressly or implicitly conferred by the Constitution.[4] Thus, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the federal government's powers.[5]

Congress possesses only those powers that are expressly or implicitly granted to it by the Constitution.[6] A power enumerated and delegated to Congress is comprehensive and complete, without limitations other than those found in the Constitution itself.[7] The Federal Constitution should be given a fair and reasonable construction so as to promote or effectuate the objects and

purposes for which it was established or the powers were conferred,[8] and an affirmative grant of governmental authority should not be narrowly construed.[9]

Footnotes

1 U.S.—Holtzman v. Schlesinger, 414 U.S. 1304, 94 S. Ct. 1, 38 L. Ed. 2d 18 (1973).
Branches of government lack natural authority
U.S.—U.S. v. Solomon, 419 F. Supp. 358 (D. Md. 1976), judgment aff'd, 563 F.2d 1121 (4th Cir. 1977).

2 U.S.—National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012).
Mo.—Kansas City v. Fishman, 362 Mo. 352, 241 S.W.2d 377 (1951).
N.J.—Behnke v. New Jersey Highway Authority, 13 N.J. 14, 97 A.2d 647 (1953).
Okla.—In re Initiative Petition No. 363, State Question No. 672, 1996 OK 122, 927 P.2d 558 (Okla. 1996).
Va.—Fairfax County Indus. Development Authority v. Coyner, 207 Va. 351, 150 S.E.2d 87 (1966).

3 U.S.—Bond v. U.S., 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014); National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012).
Neb.—Hanson v. Union Pac. R. Co., 160 Neb. 669, 71 N.W.2d 526 (1955), judgment rev'd on other grounds, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956).
"Delegated, enumerated, and limited powers"
U.S.—Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 47 Ohio Op. 307, 62 Ohio L. Abs. 405 (D. D.C. 1952), judgment aff'd, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952).

4 U.S.—Bond v. U.S., 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014); National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012).
La.—Succession of Gladney, 223 La. 949, 67 So. 2d 547 (1953).

5 U.S.—National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012).

6 U.S.—National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012).
Ala.—Kittrell v. Hatter, 243 Ala. 472, 10 So. 2d 827 (1942).
Wash.—Boeing Aircraft Co. v. Reconstruction Finance Corp., 25 Wash. 2d 652, 171 P.2d 838, 168 A.L.R. 539 (1946).
Implied powers under the Federal Constitution, see § 143.

7 U.S.—Hollingsworth v. Federal Min. & Smelting Co., 74 F. Supp. 1009 (D. Idaho 1947).
Limitations of powers by the Federal Constitution, see § 147.

8 U.S.—Lichter v. U.S., 334 U.S. 742, 68 S. Ct. 1294, 92 L. Ed. 1694 (1948).
Iowa—State v. Drake, 259 N.W.2d 862 (Iowa 1977) (abrogated on other grounds by, State v. Kaster, 469 N.W.2d 671 (Iowa 1991)).

9 D.C.—Hobson v. Hansen, 265 F. Supp. 902 (D. D.C. 1967).

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§ 143. Implied constitutional powers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 2340

The federal government possesses all powers reasonably necessary to carry into execution the powers expressly granted.

Although the states have broad authority to enact legislation for the public good, i.e., what has often been called a "police power," the federal government, by contrast, has no such authority and can exercise only the powers granted to it, including the power to make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers.[1] Congress's powers are thus not limited to the mere text of each constitutional grant of authority.[2] Instead, Congress has plenary authority in all areas in which it has substantive legislative jurisdiction as long as the exercise of that authority does not offend some other constitutional provision.[3] The Constitution expressly recognizes the power of Congress to employ the necessary means for executing the authority conferred on the federal government, by providing that Congress can make laws that are necessary and proper for carrying into execution the powers conferred by the Constitution.[4] The "Necessary and Proper Clause" of the Federal Constitution[5] is not a grant of power but a declaration that Congress possesses all of the means necessary to carry out

its specifically granted powers.[6] The provision permits a choice of means and includes, in general, all powers or means that are appropriate for accomplishing a constitutional purpose and not forbidden by the either the letter or the spirit of the Constitution.[7]

However, the clause does not override other provisions of the Constitution[8] and does not authorize Congress to simply exercise power in any way it deems convenient.[9]

Footnotes

1 U.S.—Bond v. U.S., 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014).

2 U.S.—U.S. v. Carvajal, 924 F. Supp. 2d 219 (D.D.C. 2013), aff'd, 780 F.3d 1185 (D.C. Cir. 2015).

3 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

4 U.S.—U.S. v. Carvajal, 924 F. Supp. 2d 219 (D.D.C. 2013), aff'd, 780 F.3d 1185 (D.C. Cir. 2015); U.S. v. Perkins, 383 F. Supp. 922 (N.D. Ohio 1974).

5 U.S. Const. Art. I, § 8, cl. 18.

6 U.S.—Kinsella v. U.S. ex rel. Singleton, 361 U.S. 234, 80 S. Ct. 297, 4 L. Ed. 2d 268 (1960).

7 U.S.—Atkins v. U. S., 214 Ct. Cl. 186, 556 F.2d 1028 (1977) (disapproved of on other grounds by, Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982)).

8 U.S.—Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982), judgment aff'd, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402, 77 L. Ed. 2d 1403, 77 L. Ed. 2d 1413 (1983).

9 U.S.—Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), judgment aff'd, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

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7. Grant or Limitation of Powers

b. Federal Constitution

§ 144. Limitations on powers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 2340

With its careful enumeration of federal powers and explicit statement that all powers not granted to the federal government are reserved, the Federal Constitution does not grant the federal government an unlimited license to regulate, and if no enumerated power authorizes Congress to pass a certain law, that law may not be enacted even if it would not violate any of the express prohibitions contained in the Bill of Rights or elsewhere in the Constitution.

With its careful enumeration of federal powers and explicit statement that all powers not granted to the federal government are reserved, the Federal Constitution does not grant the federal government an unlimited license to regulate.[1] The Constitution's enumeration of powers for the federal government is also a limitation of powers because the enumeration inherently presupposes the existence of something not enumerated.[2] If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted even if it would not violate any of the express prohibitions contained in the Bill of Rights or elsewhere in the Constitution.[3] Furthermore, Congress cannot, by legislation, authorize a violation of the Constitution.[4]

Footnotes

1 U.S.—Bond v. U.S., 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014); U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).

2 U.S.—National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012); U.S. v. Bellaizac-Hurtado, 700 F.3d 1245 (11th Cir. 2012).

3 U.S.—National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012).

4 U.S.—U.S. v. Odneal, 565 F.2d 598 (9th Cir. 1977).
Validity of federal statutes, generally, see § 156.

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7. Grant or Limitation of Powers

b. Federal Constitution

§ 145. Constitutional amendments

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 2340

Amendments to the Federal Constitution generally are limitations on the power of the federal government, but many of the Bill of Rights amendments have been made applicable to the states, by judicial extension, through the Due Process Clause of the Fourteenth Amendment.

The provisions of the Fourteenth Amendment prohibiting the making or enforcing of laws that abridge privileges or immunities; the deprivation of life, liberty, or property without due process of law; and the denial of the equal protection of the law refer to state action or legislation exclusively.[1] Although the first 10 amendments to the Federal Constitution, commonly known as the "Bill of Rights," guaranteeing protection to certain rights of the people, do not, by their terms, apply to the states,[2] the substantive component of the Fourteenth Amendment Due Process Clause incorporates most guarantees of the Bill of Rights, and thereby extends their protection to the states,[3] and also protects from state incursion other fundamental rights and liberties that are objectively so deeply rooted in this nation's history and tradition—and implicit in the concept of ordered liberty—that neither liberty nor justice would exist if they were sacrificed.[4]

Regulation of commerce.

The Fifth Amendment does not prohibit the exercise by Congress of its power under the Commerce Clause.[5] The authority of Congress to regulate commerce among the several states and with foreign nations is, however, subject to the limitations imposed by the Fifth Amendment, specifically the limitations imposed by the due process provision of the Fifth Amendment.

Those requirements are generally satisfied if the means of the regulation of commerce are appropriate to a permissible end.[6] The Fifth Amendment does not require full and uniform exercise of the commerce power, and Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field.[7]

Footnotes

1 U.S.—Boles v. Cox, 252 F. Supp. 173 (E.D. Tenn. 1966).
Ill.—People v. Wilson, 399 Ill. 437, 78 N.E.2d 514 (1948).
Ohio—State v. Senzarino, 10 Ohio Misc. 241, 39 Ohio Op. 2d 383, 224 N.E.2d 389 (C.P. 1967).

2 N.Y.—Application of Herlands, 204 Misc. 373, 124 N.Y.S.2d 402 (Sup 1953).
Ohio—State v. Arnold, 69 Ohio L. Abs. 148, 124 N.E.2d 473 (C.P. 1954).
Okla.—Acuff v. State, 1955 OK CR 62, 283 P.2d 856 (Okla. Crim. App. 1955).
Investigations
The Bill of Rights is applicable to investigations as to all forms of governmental action.
U.S.—Watkins v. U.S., 354 U.S. 178, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, 76 Ohio L. Abs. 225 (1957).

3 U.S.—Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); Jenkins v. Rock Hill Local School Dist., 513 F.3d 580, 229 Ed. Law Rep. 40 (6th Cir. 2008).
§ 1837.
Second Amendment
The Second Amendment right to keep and bear arms is fully applicable to the states by virtue of the Fourteenth Amendment.
U.S.—McDonald v. City of Chicago, Ill., 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).
Eighth Amendment
The Eighth Amendment to the United States Constitution applies to the states pursuant to the Fourteenth Amendment.
U.S.—State v. Hairston, 118 Ohio St. 3d 289, 2008-Ohio-2338, 888 N.E.2d 1073 (2008).

4 U.S.—Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); Jenkins v. Rock Hill Local School Dist., 513 F.3d 580, 229 Ed. Law Rep. 40 (6th Cir. 2008).

5 Hollingsworth v. Federal Min. & Smelting Co., 74 F. Supp. 1009 (D. Idaho 1947).

6 U.S.—Consumer Mail Order Ass'n of America v. McGrath, 94 F. Supp. 705 (D. D.C. 1950), judgment aff'd, 340 U.S. 925, 71 S. Ct. 500, 95 L. Ed. 668 (1951).

7 U.S.—Mabee v. White Plains Pub. Co., 327 U.S. 178, 66 S. Ct. 511, 90 L. Ed. 607 (1946).
U.S.—Consumer Mail Order Ass'n of America v. McGrath, 94 F. Supp. 705 (D. D.C. 1950), judgment aff'd, 340 U.S. 925, 71 S. Ct. 500, 95 L. Ed. 668 (1951).

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b. Federal Constitution

§ 146. Constitutional amendments—Constitutional authority to enforce Fourteenth Amendment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 2340

Congress has the power to enforce the Fourteenth Amendment by appropriate legislation where it is considered necessary or advisable; the Fourteenth Amendment empowers Congress to enact appropriate legislation establishing more exacting requirements than those minimum safeguards provided in the Amendment.

Congress has the power to enforce the Fourteenth Amendment by appropriate legislation when it is considered necessary or advisable.[1] The Fourteenth Amendment empowers Congress to enact appropriate legislation establishing more exacting requirements than those minimum safeguards provided in the Amendment.[2] Specifically, the Enforcement Clause of the Fourteenth Amendment[3] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guaranties of the Amendment.[4] By including the clause in the Amendment, its draftsmen sought to grant to Congress the same broad powers expressed in the "necessary and proper" Clause of the Constitution.[5]

Congress has no affirmative power to authorize states to violate the Fourteenth Amendment, and it is implicitly prohibited from passing legislation that purports to validate any such violation.[6]

CUMULATIVE SUPPLEMENT

Cases:

The Fourteenth Amendment does not apply to excessive force claims involving arrests, which are appropriately reviewed under a Fourth Amendment analysis. U.S. Const. Amends. 4, 14. Jackson v. Stair, 944 F.3d 704 (8th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Salisbury v. Grimes, 406 F.2d 50 (5th Cir. 1969).

2 U.S.—Scott v. City of Anniston, Ala., 597 F.2d 897 (5th Cir. 1979).

3 U.S. Const. Amend. XIV, § 5.

4 U.S.—Katzenbach v. Morgan, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966).
Matters considered
In determining whether an enactment falls within a congressional power granted by the Fourteenth Amendment, the question is not whether the means chosen by Congress are closely tailored to the ends but, rather, whether affirmative reasons can be adduced that Congress may not so act such as that action traverses a power of self-determination inhering in states, or seeks to allow or require conduct that would be constitutionally impermissible, or encroaches upon a liberty interest of individuals.
U.S.—Corpus v. Estelle, 605 F.2d 175 (5th Cir. 1979).

5 U.S.—Katzenbach v. Morgan, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966).

6 U.S.—Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999).

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c. State Constitutions

§ 147. State constitutional grants or limitations, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 639, 2330 to 2333, 2340 to 2342

The purpose and object of a state constitution are not to make specific grants of legislative power but to limit that power when it would otherwise be general or unlimited; in its exercise of the entire legislative power of the State, the legislature may enact any legislation—and on any subject—that is not prohibited by the state or federal constitution.

The purpose and object of a state constitution are not to make specific grants of legislative power but to limit that power when it would otherwise be general or unlimited.[1] In its exercise of the entire legislative power of the State, the legislature may enact any legislation, and on any subject,[2] that is not prohibited by the state[3] or federal constitution.[4] The specific powers granted by the Federal Constitution to the states to legislate in certain areas are subject to the limitation that the powers may not be exercised in a way that violates other specific provisions of the Constitution.[5]

A state constitution does not grant power[6] but instead limits the exercise and scope of legislative authority.[7] Generally phrased grants of legislative authority under the constitution are not, however, a license for the legislature to exceed the limitations

found elsewhere in the constitution.[8] All governmental authority that the people do not expressly limit in a state constitution remains with the people.[9] Enumerated rights reserved to the people, which may not be transgressed by the government, do not restrain the power of the people themselves.[10]

Construction.

Although there is case law indicating that a constitutional grant of power should be construed strictly,[11] a state constitution generally should be given a liberal and broad construction in favor of the power of the legislature.[12] However, constitutional restrictions and limitations on legislative authority are to be construed strictly and are not to be extended to include matters that are not covered by the text.[13]

Footnotes

1 Mich.—International Union, United Automobile, Aerospace, and Agr. Implement Workers of America v. Green, 302 Mich. App. 246, 839 N.W.2d 1 (2013), appeal granted, 495 Mich. 921, 843 N.W.2d 742 (2014).

2 Neb.—City of North Platte v. Tilgner, 282 Neb. 328, 803 N.W.2d 469 (2011).

3 La.—Bourgeois v. A.P. Green Indus., Inc., 783 So. 2d 1251 (La. 2001).
Neb.—City of North Platte v. Tilgner, 282 Neb. 328, 803 N.W.2d 469 (2011).
R.I.—Almond v. Rhode Island Lottery Com'n, 756 A.2d 186 (R.I. 2000).
Wash.—Automotive United Trades Organization v. State, 175 Wash. 2d 537, 286 P.3d 377 (2012).
Wis.—Town of Beloit v. County of Rock, 2003 WI 8, 259 Wis. 2d 37, 657 N.W.2d 344 (2003).

4 Me.—Lockman v. Secretary of State, 684 A.2d 415 (Me. 1996).
Mich.—Taxpayers of Michigan Against Casinos v. State, 471 Mich. 306, 685 N.W.2d 221 (2004).
R.I.—In re Request of the Senate for an Advisory Opinion, 696 A.2d 277 (R.I. 1997).
S.C.—SC Testing Technology, Inc. v. Department of Environmental Protection, 688 A.2d 421 (Me. 1996).
Wash.—Automotive United Trades Organization v. State, 175 Wash. 2d 537, 286 P.3d 377 (2012).

5 U.S.—Williams v. Rhodes, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968).

6 Ariz.—Cave Creek Unified School Dist. v. Ducey, 233 Ariz. 1, 308 P.3d 1152, 297 Ed. Law Rep. 538 (2013).
Mo.—West Central Missouri Region Lodge #50 of Fraternal Order of Police v. City of Grandview, 2015 WL 343456 (Mo. Ct. App. W.D. 2015), reh'g and/or transfer denied, (Mar. 3, 2015).
N.C.—Saine v. State, 210 N.C. App. 594, 709 S.E.2d 379, 267 Ed. Law Rep. 897 (2011).

7 Ariz.—Cave Creek Unified School Dist. v. Ducey, 233 Ariz. 1, 308 P.3d 1152, 297 Ed. Law Rep. 538 (2013).
Idaho—State v. Thiel, 158 Idaho 103, 343 P.3d 1110 (2015).
La.—Krielow v. Louisiana Dept. of Agriculture and Forestry, 125 So. 3d 384 (La. 2013).
Mo.—West Central Missouri Region Lodge #50 of Fraternal Order of Police v. City of Grandview, 2015 WL 343456 (Mo. Ct. App. W.D. 2015), reh'g and/or transfer denied, (Mar. 3, 2015).
Neb.—City of North Platte v. Tilgner, 282 Neb. 328, 803 N.W.2d 469 (2011).
Wash.—Automotive United Trades Organization v. State, 175 Wash. 2d 537, 286 P.3d 377 (2012).
Powers not limited to fundamental matters
A state constitution addresses not only those areas deemed fundamental but also others that could have been left to statutory enactment.
Okla.—Fair School Finance Council of Oklahoma, Inc. v. State, 1987 OK 114, 746 P.2d 1135, 43 Ed. Law Rep. 805 (Okla. 1987).

8 Conn.—State v. McCahill, 261 Conn. 492, 803 A.2d 901 (2002), republished at, 261 Conn. 492, 811 A.2d 667 (2002).

9 Kan.—State ex rel. State Bd. of Healing Arts v. Beyrle, 269 Kan. 616, 7 P.3d 1194 (2000).
N.C.—In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

10 Pa.—Gondelman v. Com., 520 Pa. 451, 554 A.2d 896 (1989).

11 S.C.—Williams v. Morris, 320 S.C. 196, 464 S.E.2d 97 (1995) (though grant of veto power to governor are strictly construed, vetoes exercised were found fully effective).

12 Cal.—Methodist Hosp. of Sacramento v. Saylor, 5 Cal. 3d 685, 97 Cal. Rptr. 1, 488 P.2d 161 (1971).
Kan.—State v. Roseberry, 222 Kan. 715, 567 P.2d 883 (1977).
N.Y.—Akari House, Inc. v. Irizzary, 81 Misc. 2d 543, 366 N.Y.S.2d 955 (Sup 1975).
Okla.—In re Detachment of Municipal Territory from City of Ada, Oklahoma, 2015 OK 18, 2015 WL 1432645 (Okla. 2015) (restrictions on authority to be narrowly construed).

13 Cal.—County of Riverside v. Superior Court, 30 Cal. 4th 278, 132 Cal. Rptr. 2d 713, 66 P.3d 718 (2003).
Okla.—Jackson v. Freeman, 1995 OK 100, 905 P.2d 217 (Okla. 1995).

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c. State Constitutions

§ 148. Implied powers and limitations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 639, 2330 to 2333, 2340 to 2342

Implied powers as well as implied limitations and restraints may arise under a state constitution.

Constitutional powers are often granted or restrained in general terms from which implied powers and restraints necessarily arise as ordinarily it is neither practicable, necessary, nor desirable that a constitution set forth in detail all its objects and purposes and the means for implementing them.[1] A constitutional limitation on the legislative power may be either express or implied.[2] Thus, the silence of the constitution cannot be construed as an implied prohibition on lawmaking authority of either the legislature or the people.[3] In order to create an implied prohibition, there must be some express affirmative provision,[4] but an express enumeration of legislative powers and privileges in the constitution does not preclude other, unnamed ones unless the enumeration is accompanied by negative terms.[5] There is no reason to believe that a constitutional provision enumerating powers of a branch of government is intended to be an exclusive list.[6]

A constitution that confers a power, or requires a duty to be carried out, also implicitly confers all powers that are necessary for doing so.[7] Accordingly, the legislature may select the means, within reasonable limits, to accomplish a purpose that is within its authority.[8] If a power is expressly given by the constitution, and the means by which, or the manner in which it is to be exercised, is prescribed, these means or manner exclude all others,[9] and the right or authority to use other means does not arise by implication even when they appear more convenient or effective.[10] Furthermore, if the constitution defines the circumstances under which a right may be exercised, the specification is an implied prohibition against legislative interference to add to the condition.[11] A constitutional provision directing the legislature to enact particular legislation carries no authority to enact something in addition.[12]

Limitations on the power of the legislature will not be raised by implication unless this intention clearly appears from the instrument itself.[13] Thus, any prohibition by the constitution on the legislature must be expressly provided for in the document.[14]

Footnotes

1 La.—Tanner v. Beverly Country Club, 217 La. 1043, 47 So. 2d 905 (1950).
Okla.—Oklahoma County Excise Bd. v. Kurn, 1941 OK 234, 189 Okla. 203, 115 P.2d 113 (1941).

2 La.—State v. Webb, 126 So. 3d 474 (La. 2013).
Okla.—Board of Regents of University of Oklahoma v. Baker, 1981 OK 160, 638 P.2d 464, 1 Ed. Law Rep. 1335 (Okla. 1981).
Wash.—Automotive United Trades Organization v. State, 175 Wash. 2d 537, 286 P.3d 377 (2012).

3 Ariz.—Cave Creek Unified School Dist. v. Ducey, 233 Ariz. 1, 308 P.3d 1152, 297 Ed. Law Rep. 538 (2013).

4 La.—Tanner v. Beverly Country Club, 217 La. 1043, 47 So. 2d 905 (1950).

5 Cal.—Slavich v. Walsh, 82 Cal. App. 2d 228, 186 P.2d 35 (1st Dist. 1947).
Mo.—Bohrer v. Toberman, 360 Mo. 244, 227 S.W.2d 719 (1950).
Wash.—State ex rel. Robinson v. Fluent, 30 Wash. 2d 194, 191 P.2d 241 (1948).

6 Idaho—State v. Thiel, 158 Idaho 103, 343 P.3d 1110 (2015).

7 Ga.—McLucas v. State Bridge Bldg. Authority, 210 Ga. 1, 77 S.E.2d 531 (1953).
Mo.—State ex rel. Millar v. Toberman, 360 Mo. 1101, 232 S.W.2d 904 (1950).
Nev.—Blackjack Bonding v. City of Las Vegas Municipal Court, 116 Nev. 1213, 14 P.3d 1275 (2000).
Tex.—Gill v. Falls County, 243 S.W.2d 277 (Tex. Civ. App. Waco 1951) (disapproved of on other grounds by, Hubenak v. San Jacinto Gas Transmission Co., 141 S.W.3d 172 (Tex. 2004)).

8 Colo.—Pillar of Fire v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P.2d 1250 (1973).
N.J.—Male v. Pompton Lakes Borough Municipal Utilities Authority, 105 N.J. Super. 348, 252 A.2d 224 (Ch. Div. 1969) (disapproved of on other grounds by, Male v. Ernest Renda Contracting Co., Inc., 122 N.J. Super. 526, 301 A.2d 153 (App. Div. 1973)).
N.C.—State ex rel. Utilities Commission v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).
Okla.—Spearman v. Williams, 1966 OK 33, 415 P.2d 597 (Okla. 1966).
S.C.—Powell v. Chapman, 260 S.C. 516, 197 S.E.2d 287 (1973).

9 Fla.—The Florida Bar v. Sibley, 995 So. 2d 346 (Fla. 2008).
N.M.—State ex rel. King v. Sloan, 2011-NMSC-020, 149 N.M. 620, 253 P.3d 33 (2011).

10 N.M.—Cooper v. Albuquerque City Commission, 1974-NMSC-006, 85 N.M. 786, 518 P.2d 275 (1974).
Tex.—Scoggins v. Southwestern Elec. Service Co., 434 S.W.2d 376 (Tex. Civ. App. Tyler 1968), writ refused n.r.e., (Feb. 19, 1969).

11 Tenn.—Kivett v. Mason, 185 Tenn. 558, 206 S.W.2d 789 (1947).
Tex.—Walker v. Baker, 145 Tex. 121, 196 S.W.2d 324 (1946).

12 Ariz.—Industrial Commission v. Frohmiller, 60 Ariz. 464, 140 P.2d 219 (1943).
Fla.—City of Daytona Beach v. Harvey, 48 So. 2d 924 (Fla. 1950).

13 Okla.—Board of Regents of University of Oklahoma v. Baker, 1981 OK 160, 638 P.2d 464, 1 Ed. Law Rep. 1335 (Okla. 1981).
Tex.—State ex rel. Grimes County Taxpayers Ass'n v. Texas Municipal Power Agency, 565 S.W.2d 258 (Tex. Civ. App. Houston 1st Dist. 1978), dismissed, (July 19, 1978).

14 Or.—School Dist. No. 12 of Wasco County v. Wasco County, 270 Or. 622, 529 P.2d 386 (1974).

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c. State Constitutions

§ 149. Governmental departments subject to constitutional limitations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 639, 2340

The legislative, executive and judicial departments are each subject to limitations imposed by the constitution.

Departments of the state government do not possesses arbitrary and unlimited power, and the legislative, executive, and judicial departments are each subject to limitations imposed by the constitution.[1] The legislature must act within its constitutional powers[2] and must exercise them subject to the limitations that are imposed by the state and federal constitutions.[3] Accordingly, the legislature lacks the authority to amend, repeal, set aside, or in any way alter constitutional provisions,[4] and a right that is constitutionally granted cannot be taken away or rendered nugatory by a failure of the legislature to act.[5]

The legislature may, however, enact a statute for implementing a constitutional provision,[6] and under certain circumstances —and in the absence of constitutional restriction—the legislature may enact a statute that aids or amplifies a constitutional provision.[7] The legislature may impose reasonable limitations on the exercise of constitutional guaranties, but it cannot so limit

them that they amount to a nullity[8] or engraft a condition upon a constitutional right that would, in effect, penalize the exercise of that right.[9]

Footnotes

1 Cal.—County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (4th Dist. 1973).
Minn.—State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (1954).
Neb.—State ex rel. Caldwell v. Peterson, 153 Neb. 402, 45 N.W.2d 122 (1950).
N.M.—State ex rel. Clark v. Johnson, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11 (1995).

2 Ala.—State ex rel. James v. Reed, 364 So. 2d 303 (Ala. 1978).
Mont.—Leuthold v. Brandjord, 100 Mont. 96, 47 P.2d 41 (1935).

3 Colo.—Yenter v. Baker, 126 Colo. 232, 248 P.2d 311 (1952).
Ga.—Glover v. Donaldson, 243 Ga. 479, 254 S.E.2d 857 (1979).
Mont.—State ex rel. Bennett v. Bonner, 123 Mont. 414, 214 P.2d 747 (1950).
Utah—Dean v. Rampton, 556 P.2d 205 (Utah 1976).
Wis.—Kayden Industries, Inc. v. Murphy, 34 Wis. 2d 718, 150 N.W.2d 447 (1967).
Federal constitutional limitations, see § 147.

4 Ariz.—Kilpatrick v. Superior Court In and For Maricopa County, 105 Ariz. 413, 466 P.2d 18 (1970).
Cal.—City of Modesto v. Modesto Irrigation Dist., 34 Cal. App. 3d 504, 110 Cal. Rptr. 111 (5th Dist. 1973).
Colo.—Shroyer v. Sokol, 191 Colo. 32, 550 P.2d 309 (1976).
Okla.—Oklahoma Gas & Elec. Co. v. Corporation Commission, 1975 OK 15, 543 P.2d 546 (Okla. 1975).
Tex.—Ex parte Ainsworth, 532 S.W.2d 640 (Tex. Crim. App. 1976).
Definitions of words
The legislature's authority to define terms is limited as it cannot thereby abrogate or contradict an express constitutional provision.
Neb.—State ex rel. Stenberg v. Omaha Exposition and Racing, Inc., 263 Neb. 991, 644 N.W.2d 563 (2002).
Right of action not extendable
If a survivor's cause of action for punitive damages is established in the superior provisions of the constitution, the legislature lacks the authority to enlarge the cause of action in favor of additional beneficiaries.
Tex.—Scoggins v. Southwestern Elec. Service Co., 434 S.W.2d 376 (Tex. Civ. App. Tyler 1968), writ refused n.r.e. (Feb. 19, 1969).
Forum of action
Cal.—Liera v. Los Angeles Finance Co., 99 Cal. App. 2d 254, 221 P.2d 737 (4th Dist. 1950).

5 Or.—Tomasek v. State, 196 Or. 120, 248 P.2d 703 (1952).
Silence
Just as the legislature cannot abridge constitutional rights by its enactment, it cannot curtail them through its silence.
N.J.—King v. South Jersey Nat. Bank, 66 N.J. 161, 330 A.2d 1, 15 U.C.C. Rep. Serv. 969, 75 A.L.R.3d 1030 (1974).

6 Mass.—Com. v. McGaffigan, 352 Mass. 332, 225 N.E.2d 351 (1967).
Mo.—State ex rel. Millar v. Toberman, 360 Mo. 1101, 232 S.W.2d 904 (1950).

7 Tex.—Watts v. Mann, 187 S.W.2d 917 (Tex. Civ. App. Austin 1945), writ refused.

8 Fla.—State v. Lewis, 152 Fla. 178, 11 So. 2d 337 (1943).

9 Vt.—State v. Brean, 136 Vt. 147, 385 A.2d 1085 (1978).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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8. Validity of Statutory Provisions

§ 150. Constitutional validity of statutory provisions, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 655 to 657, 659 to 661

Statutes must conform to the constitution, not vice versa; the question is not whether the power to enact a statute has been granted but whether the authority has been prohibited or denied by the constitution.

It is a basic provision of American jurisprudence that a statutory provision never be allowed to trump a constitutional right.[1] When examining statutes in the context of constitutional provisions, statutes must conform to the constitution,[2] not vice versa,[3] and any legislation must be in harmony with the constitution.[4] More specifically, in view of the rules generally recognized as to the nature of a state constitution and the powers of a state legislature, the question is not whether the authority to enact a statute has been granted but whether that power has been prohibited or denied by the constitution.[5] The only test of the validity of an act is whether it violates limitations or prohibitions imposed by the state or federal constitution,[6] and a statute is not invalid under the Federal Constitution because it might have gone farther than it did.[7] The court will not uphold an unconstitutional statute merely because the government promises to use it responsibly.[8] A legislature may not, by statutory enactment, abrogate or deny a right granted by the constitution, and a constitutional right cannot be taken away by the legislature's failure to act.[9] A legislature may, however, impose reasonable restrictions on the exercise of a constitutional right.[10]

Acts enacted through initiative.

The constitutionality of statutes enacted through the medium of the initiative is to be determined just as though it were an act of the legislature because in adopting an initiated act the people become the legislature and must legislate within constitutional limits.[11]

Necessity that specific provision be violated.

As a general rule, in order that a statute may be treated as unconstitutional and invalid, it must violate some specific or definite provision of the state or federal constitution.[12]

Legislative declarations and history.

The validity of a statute cannot stand on legislative declaration alone.[13] Additionally, a legislative failure to repeal an unconstitutional statute does not make that statute constitutionally permissible.[14] Legislative history does not render unconstitutional a statute that meets constitutional standards on its face.[15]

Footnotes

1 U.S.—Learmonth v. Sears, Roebuck and Co., 710 F.3d 249 (5th Cir. 2013).
Ariz.—State v. Lamberton, 183 Ariz. 47, 899 P.2d 939 (1995) (implementing statutes and rules).
S.D.—State v. Karlen, 1999 SD 12, 589 N.W.2d 594 (S.D. 1999).
Self-executing constitutional right
Legislation that directly or indirectly impairs, limits, or destroys rights granted by self-executing constitutional provisions is not permissible.
Colo.—Zaner v. City of Brighton, 917 P.2d 280 (Colo. 1996).

2 U.S.—U.S. v. Comstock, 560 U.S. 126, 130 S. Ct. 1949, 176 L. Ed. 2d 878, 65 A.L.R. Fed. 2d 667 (2010).

3 Nev.—Thomas v. Nevada Yellow Cab Corp., 327 P.3d 518, 130 Nev. Adv. Op. No. 52 (Nev. 2014).
S.D.—State v. Wilson, 2000 SD 133, 618 N.W.2d 513 (S.D. 2000).

4 Kan.—In re Lietz Const. Co., 273 Kan. 890, 47 P.3d 1275 (2002).
Okla.—Reherman v. Oklahoma Water Resources Bd., 1984 OK 12, 679 P.2d 1296 (Okla. 1984).

5 Kan.—Leek v. Theis, 217 Kan. 784, 539 P.2d 304 (1975).
N.D.—Stark v. City of Jamestown, 76 N.D. 422, 37 N.W.2d 516 (1949).
S.C.—Floyd v. Parker Water & Sewer Sub-District, 203 S.C. 276, 17 S.E.2d 223 (1941).
Tenn.—Cummings v. Beeler, 189 Tenn. 151, 223 S.W.2d 913 (1949).
Wis.—State ex rel. Martin v. Giessel, 252 Wis. 363, 31 N.W.2d 626 (1948).

6 La.—Hainkel v. Henry, 313 So. 2d 577 (La. 1975).
Mich.—Council of Organizations and Others for Educ. About Parochiaid, Inc. v. Governor, 455 Mich. 557, 566 N.W.2d 208, 120 Ed. Law Rep. 265, 78 A.L.R.5th 767 (1997).
N.C.—Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).
N.D.—Paluck v. Board of County Com'rs, Stark County, 307 N.W.2d 852 (N.D. 1981).
Tex.—Beckendorff v. Harris-Galveston Coastal Subsidence Dist., 558 S.W.2d 75 (Tex. Civ. App. Houston 14th Dist. 1977), writ refused n.r.e., 563 S.W.2d 239 (Tex. 1978).
Clear violation required
Kan.—State v. Duvaul, 223 Kan. 718, 576 P.2d 653 (1978).
Mich.—Kent County Prosecutor v. Kent County Sheriff, 428 Mich. 314, 409 N.W.2d 202 (1987).

Pa.—Widoff v. Disciplinary Bd. of Supreme Court of Pennsylvania, 54 Pa. Commw. 124, 420 A.2d 41 (1980), order aff'd, 494 Pa. 129, 430 A.2d 1151 (1981).
R.I.—In re Advisory Opinion to Governor, 113 R.I. 586, 324 A.2d 641 (1974).

7 U.S.—Ognibene v. Parkes, 671 F.3d 174 (2d Cir. 2011) (First Amendment).

8 U.S.—U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); Doe v. Harris, 772 F.3d 563 (9th Cir. 2014).

9 U.S.—Gross v. Tazewell County Jail, 533 F. Supp. 413 (W.D. Va. 1982).
Alaska—Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979).
Ariz.—Mohave County v. Chamberlin, 78 Ariz. 422, 281 P.2d 128 (1955).
Md.—Goode v. State, 41 Md. App. 623, 398 A.2d 801 (1979).
N.Y.—Town of Pompey v. Parker, 53 A.D.2d 125, 385 N.Y.S.2d 959 (4th Dep't 1976), judgment aff'd, 44 N.Y.2d 805, 406 N.Y.S.2d 287, 377 N.E.2d 741 (1978).

10 Miss.—Kelly v. State, 797 So. 2d 1003 (Miss. 2001).

11 Ark.—Jeffery v. Trevathan, 215 Ark. 311, 220 S.W.2d 412 (1949).
Cal.—Fair Political Practices Com. v. State Personnel Bd., 77 Cal. App. 3d 52, 143 Cal. Rptr. 393 (3d Dist. 1978) (disapproved of on other grounds by, Pacific Legal Foundation v. Brown, 29 Cal. 3d 168, 172 Cal. Rptr. 487, 624 P.2d 1215 (1981)).
Mass.—Bowe v. Secretary of the Com., 320 Mass. 230, 69 N.E.2d 115, 167 A.L.R. 1447 (1946).
Language surplusage
An initiative provision stating that an English-only law should not be construed to limit the constitutional rights of any citizen, state employee, private business, or corporation was mere surplusage because a statutory provision that conflicted with either the United States or state constitutions was unenforceable.
Okla.—In re Initiative Petition No. 366, 2002 OK 21, 46 P.3d 123 (Okla. 2002).

12 Fla.—City of St. Augustine v. Authentic Old Jail, Inc., 388 So. 2d 1044 (Fla. 5th DCA 1980).
La.—Krielow v. Louisiana Dept. of Agriculture and Forestry, 125 So. 3d 384 (La. 2013).
S.C.—Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975).
S.D.—In re Heartland Consumers Power Dist., 85 S.D. 205, 180 N.W.2d 398 (1970).
Tex.—Texas Public Bldg. Authority v. Mattox, 686 S.W.2d 924 (Tex. 1985).
Wash.—State ex rel. Heavey v. Murphy, 138 Wash. 2d 800, 982 P.2d 611 (1999).

13 Ark.—Union Carbide & Carbon Corp. v. White River Distributors, 224 Ark. 558, 275 S.W.2d 455 (1955).
Mass.—In re Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955).
N.H.—In re Opinion of the Justices, 99 N.H. 528, 114 A.2d 514 (1955).
Wash.—State ex rel. O'Connell v. Slavin, 75 Wash. 2d 554, 452 P.2d 943 (1969).

14 Pa.—South Newton Tp. Electors v. South Newton Tp. Sup'r, Bouch, 575 Pa. 670, 838 A.2d 643 (2003).

15 Idaho—State v. Casey, 125 Idaho 856, 876 P.2d 138 (1994).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

8. Validity of Statutory Provisions

§ 151. Determination of invalidity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 655 to 657, 659 to 661

Generally, a statute that violates a constitutional provision is void and without binding force.

Generally, a statute that violates a constitutional provision is void and without binding force[1] and should not be enforced.[2] However, all legislation enacted by a state legislature is considered constitutional until declared otherwise in adversary proceedings brought between interested persons.[3]

Footnotes

1 U.S.—Payne v. Griffin, 51 F. Supp. 588 (M.D. Ga. 1943).
Ga.—Grayson-Robinson Stores, Inc. v. Oneida, Limited, 209 Ga. 613, 75 S.E.2d 161 (1953).
Ind.—State ex rel. Beaman v. Circuit Court of Pike County, 229 Ind. 190, 96 N.E.2d 671 (1951).
Neb.—Jaksha v. State, 241 Neb. 106, 486 N.W.2d 858 (1992).
Statute inconsistent with state constitution is void

Cal.—Hotel Employees and Restaurant Employees Intern. Union v. Davis, 21 Cal. 4th 585, 88 Cal. Rptr. 2d 56, 981 P.2d 990 (1999).

2 U.S.—Payne v. Griffin, 51 F. Supp. 588 (M.D. Ga. 1943).

3 La.—American Waste & Pollution Control Co. v. St. Martin Parish Police Jury, 627 So. 2d 158 (La. 1993).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

8. Validity of Statutory Provisions

§ 152. Effect of validity, invalidity, or partial invalidity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 655 to 657, 659 to 661

If individual aspects of a statute are constitutionally valid, the whole statute must also be valid.

If individual aspects of a statute are constitutionally valid, the whole statute must also be valid.[1] It has been held that a statute need not necessarily stand or fall unitarily, as some subsections may be constitutional and others not,[2] and that if all or part of a statute conflicts with a constitutional provision or provisions, the court must hold the conflicting portions invalid.[3] There is also authority, however, that in reviewing the constitutionality of a statute the court will refuse to excise individual components of a larger statutory scheme.[4]

Footnotes

1 Ill.—People v. Harris, 164 Ill. 2d 322, 207 Ill. Dec. 400, 647 N.E.2d 893 (1994).

2 Ill.—Hill v. Cowan, 202 Ill. 2d 151, 269 Ill. Dec. 875, 781 N.E.2d 1065 (2002), as modified on denial of reh'g, (Dec. 2, 2002).

3 Mo.—Farmer v. Kinder, 89 S.W.3d 447 (Mo. 2002).

4 U.S.—U.S. v. Anderson, 771 F.3d 1064 (8th Cir. 2014), cert. denied, 135 S. Ct. 1575 (2015).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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8. Validity of Statutory Provisions

§ 153. Facial invalidity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 655 to 657, 659 to 661

A statute is facially unconstitutional if no conceivable set of circumstances exists under which it would be valid, and a statute that is constitutional on its face may be unconstitutional as applied.

A statute may be unconstitutional either on its face or as applied.[1] A party may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both.[2] The line between facial and as-applied relief is fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation.[3]

A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully[4] because an enactment is facially invalid only if no set of circumstances exist under which it would be valid[5] or, in the freedom of expression context, when the law it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad.[6] A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure

itself, not its application to the specific circumstances under which a person acted.[7] Facial challenges are disfavored as they often rest on speculation and raise risk of premature interpretation of statutes on basis of factually barebones records.[8]

A "facial challenge" to the constitutionality of a statute means a claim that the law is invalid[9] in toto and therefore incapable of any valid application.[10] A facial challenge thus fails when a statute has a plainly legitimate sweep[11] or even if there is any situation in which the statute could be validly applied.[12] Thus, if a statute is constitutional as applied to a litigant, the litigant lacks standing to assert a facial constitutional challenge to it, and the statute is not facially unconstitutional as it has at least one constitutional application.[13] A litigant challenging the facial validity of a statute cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute.[14]

CUMULATIVE SUPPLEMENT

Cases:

Facial, as opposed to as-applied, challenges to a statute or regulation are considered the most difficult to mount successfully. Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019).

A facial challenge to a statute presents a higher bar than an as-applied challenge because it requires four votes in the Supreme Court to declare a legislative enactment unconstitutional. N.D. Const. art. 6, § 4. Sorum v. State, 2020 ND 175, 947 N.W.2d 382 (N.D. 2020).

In determining whether a statute is facially invalid on constitutional grounds, courts do not look beyond the statute's explicit requirements or speculate about hypothetical or imaginary cases. Germantown Cab Company v. Philadelphia Parking Authority, 206 A.3d 1030 (Pa. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Alaska—State, Dept. of Revenue, Child Support Enforcement Div. v. Beans, 965 P.2d 725 (Alaska 1998).
Utah—State v. Herrera, 1999 UT 64, 993 P.2d 854 (Utah 1999).
Colo.—People v. Trujillo, 2015 COA 22, 2015 WL 1089909 (Colo. App. 2015).

2 N.H.—Lennartz v. Oak Point Associates, P.A., 2015 WL 734335 (N.H. 2015).

3 U.S.—American Federation of State, County and Mun. Employees Council 79 v. Scott, 717 F.3d 851 (11th Cir. 2013), cert. denied, 134 S. Ct. 1877, 188 L. Ed. 2d 912 (2014).

4 U.S.—Doe v. City of Albuquerque, 667 F.3d 1111, 81 Fed. R. Serv. 3d 783 (10th Cir. 2012); General Elec. Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010).
Ill.—Napleton v. Village of Hinsdale, 229 Ill. 2d 296, 322 Ill. Dec. 548, 891 N.E.2d 839 (2008).
N.M.—Swepi, LP v. Mora County, N.M., 2015 WL 365923 (D.N.M. 2015).

5 U.S.—U.S. v. Pendleton, 658 F.3d 299 (3d Cir. 2011).
Colo.—People v. Trujillo, 2015 COA 22, 2015 WL 1089909 (Colo. App. 2015).
Fla.—State v. Hosty, 944 So. 2d 255 (Fla. 2006).
Idaho—Moon v. North Idaho Farmers Ass'n, 140 Idaho 536, 96 P.3d 637 (2004).
Ill.—Napleton v. Village of Hinsdale, 229 Ill. 2d 296, 322 Ill. Dec. 548, 891 N.E.2d 839 (2008).
Neb.—Thompson v. Heineman, 289 Neb. 798, 857 N.W.2d 731 (2015).
N.H.—State v. Hollenbeck, 164 N.H. 154, 53 A.3d 591 (2012).

6 U.S.—Preston v. Leake, 660 F.3d 726 (4th Cir. 2011).
Ohio—State v. Ossege, 2014-Ohio-3186, 17 N.E.3d 30 (Ohio Ct. App. 12th Dist. Clermont County 2014), appeal not allowed, 141 Ohio St. 3d 1473, 2015-Ohio-554, 25 N.E.3d 1080 (2015).

7 Cal.—In re Taylor, 60 Cal. 4th 1019, 184 Cal. Rptr. 3d 682, 343 P.3d 867 (2015).
Colo.—People v. Trujillo, 2015 COA 22, 2015 WL 1089909 (Colo. App. 2015).
Fla.—Abdool v. Bondi, 141 So. 3d 529 (Fla. 2014).
N.M.—State v. Murillo, 2015 WL 270053 (N.M. Ct. App. 2015).

8 U.S.—CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612 (3d Cir. 2013); Young v. Ricketts, 2015 WL 401314 (D. Neb. 2015).

9 Va.—Toghill v. Com., 768 S.E.2d 674 (Va. 2015).

10 Conn.—State v. Long, 268 Conn. 508, 847 A.2d 862 (2004).
Iowa—Spiker v. Spiker, 708 N.W.2d 347 (Iowa 2006).

11 Fla.—Smalley v. Duke Energy Florida, Inc., 154 So. 3d 439 (Fla. 2d DCA 2014).

12 Ill.—People v. Huddleston, 212 Ill. 2d 107, 287 Ill. Dec. 560, 816 N.E.2d 322 (2004).

13 U.S.—U.S. v. Decastro, 682 F.3d 160 (2d Cir. 2012), cert. denied, 133 S. Ct. 838, 184 L. Ed. 2d 665 (2013).
Va.—Toghill v. Com., 768 S.E.2d 674 (Va. 2015).

14 U.S.—Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013), cert. denied, 134 S. Ct. 2140, 188 L. Ed. 2d 1125 (2014); Doe v. City of Albuquerque, 667 F.3d 1111, 81 Fed. R. Serv. 3d 783 (10th Cir. 2012).
Cal.—Zuckerman v. State Board of Chiropractic Examiners, 29 Cal. 4th 32, 124 Cal. Rptr. 2d 701, 53 P.3d 119 (2002).
Tex.—Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen, 952 S.W.2d 454 (Tex. 1997), as supplemented on denial of reh'g, (Oct. 9, 1997).

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8. Validity of Statutory Provisions

§ 154. Invalidity as applied

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 655 to 657, 659 to 661

A statute that is constitutional on its face may nonetheless be unconstitutional as applied.

A statute that is constitutional on its face may nonetheless be unconstitutional as applied.[1] This prevents its future application in a similar context but does notrender it utterly inoperative.[2] Thus, the mere fact that there might be a situation under which applying the provisions of a statute would result in a constitutional violation does not render the statute unconstitutional but merely prevents its application in similar situations.[3]

A statute may be constitutional as applied to one set of facts and unconstitutional as applied to another.[4] Unlike a statute that is held unconstitutional on its face—which cannot be enforced in any future circumstances—a statute that is held unconstitutional as applied can be enforced in those future circumstances where it is not unconstitutional.[5] More specifically, an as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional.[6]

Footnotes

1 Ala.—City of Montgomery v. Water Works and Sanitary Sewer Bd. of City of Montgomery, 660 So. 2d 588 (Ala. 1995).
Ind.—Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247, 118 A.L.R.5th 771 (Ind. 2003).
Colo.—E-470 Public Highway Authority v. Revenig, 91 P.3d 1038 (Colo. 2004).

2 Ohio—Yajnik v. Akron Dept. of Health, Hous. Div., 101 Ohio St. 3d 106, 2004-Ohio-357, 802 N.E.2d 632 (2004).
Wash.—State v. Hunley, 175 Wash. 2d 901, 287 P.3d 584 (2012).

3 S.D.—State v. Jensen, 2003 SD 55, 662 N.W.2d 643 (S.D. 2003).

4 U.S.—Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006).
Kan.—Joe Self Chevrolet, Inc. v. Board of County Com'rs of Sedgwick County, 247 Kan. 625, 802 P.2d 1231 (1990).

5 Colo.—Gessler v. Colorado Common Cause, 2014 CO 44, 327 P.3d 232 (Colo. 2014).

6 Ohio—Yajnik v. Akron Dept. of Health, Hous. Div., 101 Ohio St. 3d 106, 2004-Ohio-357, 802 N.E.2d 632 (2004).
Wash.—City of Redmond v. Moore, 151 Wash. 2d 664, 91 P.3d 875 (2004).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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8. Validity of Statutory Provisions

§ 155. Specific circumstances as affecting validity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 655 to 657, 659 to 661

In determining the validity of state statutes, the effect of particular circumstances has been adjudicated with respect to such matters as usefulness, necessity or emergency, lapse of time and acquiescence, and the fact that a statute may be improved.

The fact that a given law or procedure is efficient, convenient, and useful in facilitating the functions of government will not alone save it if the provision is contrary to the constitution.[1] However, exceptional conditions can justify legislative measures that are not otherwise appropriate.[2] In general, even necessity must give way to the constitution and not the constitution to necessity.[3] Legislation that violates an express mandate of a constitution is invalid even though it is expedient or otherwise in the public interest.[4] Thus, as affecting the validity of a statute, the existence of an emergency does not create or bestow, and is not the source of, legislative power;[5] nor does an emergency increase granted power or remove or diminish restrictions imposed or powers granted or reserved.[6] Nevertheless, an emergency may furnish the occasion for exercising authority that already exists.[7]

Lapse of time, long usage, and acquiescence.

Each law's constitutionality is not cast in stone at the time of the law's enactment.[8] A lapse of time or length of usage will not, of itself, validate a statute that conflicts with the constitution,[9] but a contrary decision may be reached if the legislature was aware of the provision, and it has gone unchallenged.[10] However, the fact that the legislature has passed numerous statutes of the nature of the one attacked does not justify the latter if it violates the constitution.[11]

Other considerations or objections.

The fact the law can be improved does not make it unconstitutional.[12] A statute is not unconstitutional or invalid merely because it does not cover the entire field or subject matter that might properly have been included,[13] it might have gone further than it did,[14] it does not create a perfect plan to accomplish its purpose,[15] or it may not actually accomplish its intended goals.[16] Similarly, a statute is not invalid even though it may be impracticable or unworkable[17] or difficult of application in particular situations or under the circumstances.[18] Even statutes based upon mistaken legislative facts may withstand constitutional challenge.[19]

The same result will follow even though the statute does not operate with perfect equality or exact justice under all circumstances,[20] may operate inequitably or in an unduly onerous manner,[21] may cause hardship[22] or inconvenience,[23] or is subject to abuse[24] or wrongful or improper administration.[25]

The validity of a statute does not depend on its wisdom[26] or good faith.[27] A statute is not rendered unconstitutional and invalid by the fact that interested persons induced the legislature to enact it,[28] that the public need satisfied by the law coincides with the personal desires of the individual most directly affected,[29] or that the statute results in private profit or advantage.[30] The controlling cause for the enactment of a statute does not in general affect its validity,[31] and a lawful purpose alone will not save a statute that clearly violates constitutional principles[32] regardless of the fact that it is based on strong considerations of public policy.[33] Only if the state constitution withdraws legislative power will the court conclude an enactment is invalid for want of authority.[34]

To be constitutional, a law need not—in every aspect—be logically consistent with its aims.[35] However, a statute cannot be condoned if it includes haphazard and anachronistic exceptions that are unconnected to its purpose.[36]

Footnotes

1 U.S.—Stern v. Marshall, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011).
N.M.—State ex rel. Clark v. Johnson, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11 (1995).

2 Ala.—Shelby County, Ala. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

3 Mass.—In re Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955).

4 Me.—Maine Beer & Wine Wholesalers Ass'n v. State, 619 A.2d 94 (Me. 1993).
Apparent need for law
A void provision of a statute cannot be made valid because of the apparent need for the law attempted to be adopted.
Okla.—Reherman v. Oklahoma Water Resources Bd., 1984 OK 12, 679 P.2d 1296 (Okla. 1984).
Important legislative interest

A state legislative interest, no matter how important, cannot trump a state constitutional command.
Or.—State v. Stoneman, 323 Or. 536, 920 P.2d 535 (1996).

5 U.S.—Veix v. Sixth Ward Building & Loan Ass'n of Newark, 310 U.S. 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940).
Cal.—Miller v. Municipal Court of City of Los Angeles, 22 Cal. 2d 818, 142 P.2d 297 (1943).

6 Cal.—Miller v. Municipal Court of City of Los Angeles, 22 Cal. 2d 818, 142 P.2d 297 (1943).

7 U.S.—State of S.C. v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) (abrogated on other grounds by, Shelby County, Ala. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013)).
Cal.—Miller v. Municipal Court of City of Los Angeles, 22 Cal. 2d 818, 142 P.2d 297 (1943).

8 Ohio—Caruso v. Aluminum Co. of America, 15 Ohio St. 3d 306, 473 N.E.2d 818 (1984).

9 N.M.—State ex rel. Gesswein v. Galvan, 1984-NMSC-025, 100 N.M. 769, 676 P.2d 1334 (1984).

10 Ark.—Williams v. City of Pine Bluff, 284 Ark. 551, 683 S.W.2d 923 (1985).

11 Ind.—Harrell v. Sullivan, 220 Ind. 108, 41 N.E.2d 354, 140 A.L.R. 455 (1942).
N.C.—Bowie v. Town of West Jefferson, 231 N.C. 408, 57 S.E.2d 369 (1950).

12 Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 265 Kan. 779, 962 P.2d 543 (1998).

13 U.S.—Mid-Atlantic Accessories Trade Ass'n v. State of Md., 500 F. Supp. 834 (D. Md. 1980).
Ill.—People v. Bowman, 96 Ill. App. 3d 136, 51 Ill. Dec. 574, 420 N.E.2d 1132 (5th Dist. 1981).
N.J.—Male v. Pompton Lakes Borough Municipal Utilities Authority, 105 N.J. Super. 348, 252 A.2d 224 (Ch. Div. 1969) (disapproved of on other grounds by, Male v. Ernest Renda Contracting Co., Inc., 122 N.J. Super. 526, 301 A.2d 153 (App. Div. 1973)).
N.Y.—Lombardi v. Nyquist, 63 A.D.2d 1058, 406 N.Y.S.2d 148 (3d Dep't 1978).
S.C.—Bauer v. South Carolina State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978).

14 U.S.—East Texas Guidance & Achievement Center, Inc. v. Brockette, 431 F. Supp. 231 (E.D. Tex. 1977).
N.J.—West Morris Regional Bd. of Ed. v. Sills, 58 N.J. 464, 279 A.2d 609 (1971).

15 U.S.—Arredondo v. Brockette, 482 F. Supp. 212 (S.D. Tex. 1979), decision aff'd, 648 F.2d 425 (5th Cir. 1981), judgment aff'd, 461 U.S. 321, 103 S. Ct. 1838, 75 L. Ed. 2d 879, 10 Ed. Law Rep. 11 (1983).
Colo.—People v. Elliott, 186 Colo. 65, 525 P.2d 457 (1974).

16 Fla.—U.S. Fidelity and Guar. Co. v. Department of Ins., 453 So. 2d 1355 (Fla. 1984).

17 N.J.—State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (County Ct. 1968).

18 N.Y.—Housing and Development Administration of City of New York v. Community Housing Improvement Program, Inc., 83 Misc. 2d 977, 374 N.Y.S.2d 520 (N.Y. City Civ. Ct. 1975), aff'd as modified on other grounds, 90 Misc. 2d 813, 396 N.Y.S.2d 125 (App. Term 1977), order aff'd, 59 A.D.2d 773, 398 N.Y.S.2d 997 (2d Dep't 1977).
Utah—Trade Commission v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 446 P.2d 958 (1968).
Wash.—State v. Cann, 92 Wash. 2d 193, 595 P.2d 912 (1979).

19 Me.—Aseptic Packaging Council v. State, 637 A.2d 457 (Me. 1994).

20 U.S.—Arredondo v. Brockette, 482 F. Supp. 212 (S.D. Tex. 1979), decision aff'd, 648 F.2d 425 (5th Cir. 1981), judgment aff'd, 461 U.S. 321, 103 S. Ct. 1838, 75 L. Ed. 2d 879, 10 Ed. Law Rep. 11 (1983).

Natural justice

If a legislature passes a law within the general scope of its constitutional authority, a court cannot void the law merely because the court views the law as contrary to principles of natural justice.
Ohio—State v. Williams, 88 Ohio St. 3d 513, 2000-Ohio-428, 728 N.E.2d 342 (2000).

21 U.S.—East Texas Guidance & Achievement Center, Inc. v. Brockette, 431 F. Supp. 231 (E.D. Tex. 1977).
Colo.—People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).
Ill.—Peabody Coal Co. v. Illinois Pollution Control Bd., 36 Ill. App. 3d 5, 344 N.E.2d 279 (5th Dist. 1976).
Wash.—In re Binding Declaratory Ruling of Dept. of Motor Vehicles, 87 Wash. 2d 686, 555 P.2d 1361 (1976).

22 Iowa—Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995).
Me.—von Tiling v. City of Portland, 268 A.2d 888 (Me. 1970).
N.Y.—Bryant Westchester Realty Corp. v. Board of Health of City of New York, 91 Misc. 2d 56, 397 N.Y.S.2d 322 (Sup 1977).

Substantial expenditures to comply

The fact that one must make substantial expenditures to comply with regulatory statutes does not raise constitutional barriers.

Iowa—Goodenow v. City Council of Maquoketa, Iowa, 574 N.W.2d 18 (Iowa 1998).

23 Utah—Trade Commission v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 446 P.2d 958 (1968).

24 U.S.—Faulkner v. Clifford, 289 F. Supp. 895 (E.D. N.Y. 1968).

Ill.—Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 354 N.E.2d 489 (2d Dist. 1976), judgment aff'd, 68 Ill. 2d 352, 12 Ill. Dec. 185, 369 N.E.2d 892 (1977).

Wis.—City of Milwaukee v. Wilson, 96 Wis. 2d 11, 291 N.W.2d 452 (1980).

25 U.S.—Mercer v. Michigan State Bd. of Ed., 379 F. Supp. 580 (E.D. Mich. 1974), judgment aff'd, 419 U.S. 1081, 95 S. Ct. 673, 42 L. Ed. 2d 678 (1974).

Mich.—People v. Kirby, 440 Mich. 485, 487 N.W.2d 404 (1992).

N.J.—L. R. C. v. Klein, 156 N.J. Super. 239, 383 A.2d 764 (Law Div. 1978), judgment aff'd, 167 N.J. Super. 23, 400 A.2d 496 (App. Div. 1979).

Wis.—City of Milwaukee v. Wilson, 96 Wis. 2d 11, 291 N.W.2d 452 (1980).

26 U.S.—Arredondo v. Brockette, 482 F. Supp. 212 (S.D. Tex. 1979), decision aff'd, 648 F.2d 425 (5th Cir. 1981), judgment aff'd, 461 U.S. 321, 103 S. Ct. 1838, 75 L. Ed. 2d 879, 10 Ed. Law Rep. 11 (1983).

Cal.—Bennett v. Superior Court of Placer County, 131 Cal. App. 2d 841, 281 P.2d 285 (3d Dist. 1955).

Conn.—Tolisano v. State, 19 Conn. Supp. 266, 111 A.2d 562 (Super. Ct. 1954).

Relation between means and end

Courts will sustain a legislative enactment if the means chosen bear a rational relationship to a legitimate state objective and are not arbitrary, capricious, or unreasonable.

N.J.—Roman Check Cashing, Inc. v. New Jersey Department of Banking and Ins., 169 N.J. 105, 777 A.2d 1 (2001).

27 Pa.—Com. v. Contakos, 455 Pa. 136, 314 A.2d 259 (1974).

28 U.S.—Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

Mass.—Mobil Oil Corp. v. Attorney General, 361 Mass. 401, 280 N.E.2d 406, 57 A.L.R.3d 1265 (1972).

Va.—Industrial Development Authority of City of Richmond v. La France Cleaners & Laundry Corp., 216 Va. 277, 217 S.E.2d 879 (1975).

29 U.S.—Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947).

30 Ill.—Bathe v. Stamper, 75 Ill. App. 2d 265, 220 N.E.2d 641 (4th Dist. 1966).

Mass.—Larkin v. Charlestown Sav. Bank, 7 Mass. App. Ct. 178, 386 N.E.2d 790 (1979).

N.Y.—Murphy v. Erie County, 60 Misc. 2d 954, 304 N.Y.S.2d 242 (Sup 1969), order aff'd, 34 A.D.2d 295, 310 N.Y.S.2d 959 (4th Dep't 1970), order aff'd, 28 N.Y.2d 80, 320 N.Y.S.2d 29, 268 N.E.2d 771 (1971).

31 Conn.—Carroll v. Socony-Vacuum Oil Co., 136 Conn. 49, 68 A.2d 299 (1949).

N.H.—Allen v. Manchester, 99 N.H. 388, 111 A.2d 817 (1955).

N.J.—Werner Mach. Co. v. Director of Division of Taxation, Dept. of Treasury, 31 N.J. Super. 444, 107 A.2d 36 (App. Div. 1954), aff'd, 17 N.J. 121, 110 A.2d 89 (1954), judgment aff'd, 350 U.S. 492, 76 S. Ct. 534, 100 L. Ed. 634 (1956).

Ohio—Motors Ins. Corp. v. Robinson, 62 Ohio L. Abs. 58, 106 N.E.2d 572 (C.P. 1951), judgment aff'd, 62 Ohio L. Abs. 72, 106 N.E.2d 581 (Ct. App. 2d Dist. Franklin County 1951).

Motivation of legislators

U.S.—Dupont v. Kember, 501 F. Supp. 1081 (M.D. La. 1980).

32 Mich.—Kent County Prosecutor v. Kent County Sheriff, 428 Mich. 314, 409 N.W.2d 202 (1987).

33 Mass.—Com. v. Joyce, 326 Mass. 751, 97 N.E.2d 192 (1951).

N.Y.—Matter of Andrea B., 94 Misc. 2d 919, 405 N.Y.S.2d 977 (Fam. Ct. 1978).

Wyo.—Witzenburger v. State ex rel. Wyoming Community Development Authority, 575 P.2d 1100 (Wyo. 1978).

34 Cal.—California Redevelopment Assn. v. Matosantos, 53 Cal. 4th 231, 135 Cal. Rptr. 3d 683, 267 P.3d 580 (2011).

35 N.J.—Reiser v. Pension Commission of Emp. Retirement System of Passaic County, 147 N.J. Super. 168, 370 A.2d 902 (Law Div. 1976).

36 N.Y.—People v. Abrahams, 40 N.Y.2d 277, 386 N.Y.S.2d 661, 353 N.E.2d 574 (1976).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

8. Validity of Statutory Provisions

§ 156. Federal statutes

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 655 to 657, 659 to 661

The validity of an act of Congress depends primarily on whether power to enact it has been granted by the Federal Constitution either expressly or impliedly.

The validity of an act of Congress depends primarily on whether power to enact it has been granted by the Federal Constitution, either expressly or impliedly, and furthermore, an act is void if it conflicts with the Constitution.[1] Furthermore, an act is void if it conflicts with the Constitution.[2] No act of Congress can authorize the violation of the Constitution.[3]

The Constitution nullifies sophisticated as well as naive modes of infringing on constitutional protections.[4] So long as the method chosen by Congress is constitutional, it does not matter that alternative methods exist.[5] Where possible, a court interprets congressional enactments so as to avoid raising serious constitutional questions.[6]

Footnotes

1 U.S.—U. S. v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974).
Wash.—Union High School Dist. No. 1, Skagit County v. Taxpayers of Union High School Dist. No. 1 of Skagit County, 26 Wash. 2d 1, 172 P.2d 591 (1946).
Power of Congress, generally, see § 142.
Implied powers, generally, see § 143.

2 U.S.—U.S. v. Windsor, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013) (Defense of Marriage Act).
Cal.—Silva v. Superior Court, 52 Cal. App. 3d 269, 125 Cal. Rptr. 78 (2d Dist. 1975).

3 U.S.—U.S. v. Villamonte-Marquez, 462 U.S. 579, 103 S. Ct. 2573, 77 L. Ed. 2d 22 (1983).
Md.—Goode v. State, 41 Md. App. 623, 398 A.2d 801 (1979).

4 U.S.—U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).

5 U.S.—U.S. v. Villamonte-Marquez, 462 U.S. 579, 103 S. Ct. 2573, 77 L. Ed. 2d 22 (1983).

6 U.S.—Cheek v. U.S., 498 U.S. 192, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

B. Operation and Effect

8. Validity of Statutory Provisions

§ 157. Public policy and morals

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 655 to 657, 659

Because the establishment of public policy is primarily for the lawmakers, a state statute is not void as against public policy if it is not in conflict with a constitutional provision.

Although the public policy of any state is to be found in its constitution, the acts of the legislature, and the decisions of its courts, and applicable rules of common law,[1] and in the Federal Constitution and decisions of the United States Supreme Court,[2] its establishment is primarily for the lawmakers.[3]

In other words, although the public policy of the state, as declared by the state constitution, prevails over an attempted declaration of public policy by the legislature in a state statute,[4] the legislature may, by statute, determine or alter public policy, subject to constitutional limitations and restrictions.[5] Hence, a statute is not invalid as against public policy if it does not conflict with any constitutional provision.[6]

Footnotes

1 Ala.—Higgins v. Nationwide Mut. Ins. Co., 50 Ala. App. 691, 282 So. 2d 295 (Civ. App. 1973), decision aff'd, 291 Ala. 462, 282 So. 2d 301 (1973).
Ill.—Wohl v. Wohl, 28 Ill. App. 3d 298, 328 N.E.2d 138 (1st Dist. 1975).
N.Y.—Will of Pace, 93 Misc. 2d 969, 400 N.Y.S.2d 488 (Sur. Ct. 1977).
Tenn.—State ex rel. Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975).

2 Cal.—Craemer v. Superior Court In and For Marin County, 265 Cal. App. 2d 216, 71 Cal. Rptr. 193 (1st Dist. 1968).

3 Minn.—Starr v. Cooks, Waiters, Waitresses and Helpers Union Local No. 458, 244 Minn. 558, 70 N.W.2d 873 (1955).

4 Ala.—Ex parte Bentley, 116 So. 3d 201 (Ala. 2012).
Idaho—Idaho Telephone Co. v. Baird, 91 Idaho 425, 423 P.2d 337 (1967) (disavowed on other grounds by, Simmons v. Idaho State Tax Com'n, 111 Idaho 343, 723 P.2d 887 (1986)).
"Social morality"
Legislative enactments setting "social morality" are not exempt from judicial review testing their constitutional mettle.
Ga.—Powell v. State, 270 Ga. 327, 510 S.E.2d 18 (1998).

5 U.S.—Wilson & Co. v. N.L.R.B., 162 F.2d 310 (C.C.A. 8th Cir. 1947).
Ariz.—Roberts v. Spray, 71 Ariz. 60, 223 P.2d 808 (1950).
Or.—Anderson v. Finzel, 204 Or. 162, 282 P.2d 358 (1955).
Wyo.—Galesburg Const. Co. Inc. of Wyoming v. Board of Trustees of Memorial Hospital of Converse County, 641 P.2d 745 (Wyo. 1982).
Explicit expression
Even when the legislature seeks to depart from salutary public-policy principles, it must express its intention to do so expressly, and any authority so granted will be strictly construed.
Pa.—Consumers Ed. and Protective Ass'n v. Schwartz, 495 Pa. 10, 432 A.2d 173 (1981).
Measures introduced but not passed
Public policy is not indicated by measures that have been introduced in the legislature but not enacted into law.
Or.—Eugene Theatre Co. v. City of Eugene, 194 Or. 603, 243 P.2d 1060 (1952).

6 Ala.—Higgins v. Nationwide Mut. Ins. Co., 50 Ala. App. 691, 282 So. 2d 295 (Civ. App. 1973), decision aff'd, 291 Ala. 462, 282 So. 2d 301 (1973).
Cal.—English v. Marin Mun. Water Dist., 66 Cal. App. 3d 725, 136 Cal. Rptr. 224 (1st Dist. 1977) (disapproved of on other grounds by, Delta Farms Reclamation Dist. v. Superior Court, 33 Cal. 3d 699, 190 Cal. Rptr. 494, 660 P.2d 1168 (1983)).
Ga.—Barge v. Camp, 209 Ga. 38, 70 S.E.2d 360 (1952).
Wyo.—Galesburg Const. Co. Inc. of Wyoming v. Board of Trustees of Memorial Hospital of Converse County, 641 P.2d 745 (Wyo. 1982).

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III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

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Research References

A.L.R. Library

A.L.R. Index, Abortion
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A.L.R. Index, Constitutional Law
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A.L.R. Index, Standing
A.L.R. Index, Standing to Sue
A.L.R. Index, Vagueness
West's A.L.R. Digest, Constitutional Law 656, 657, 665 to 675, 680, 681, 683, 685 to 689, 695 to 697, 699 to 720, 726, 727, 730, 735, 739, 740 to 741, 945 to 953, 765, 769 to 771, 799 to 801, 829 to 831, 859 to 861, 889 to 891, 915, 919 to 921, 946 to 948, 950, 951, 953

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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C. Persons Entitled to Raise Constitutional Questions

1. In General

§ 158. Requirement of standing to challenge constitutionality

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 665, 666, 668 to 671, 673 to 675

A person must have standing before he or she may challenge the constitutionality of a statute or government action.

Article III of the United States Constitution gives federal courts jurisdiction only over cases and controversies, and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process.[1] Thus, a person must have standing to be able to assert a challenge to the constitutionality of a statute or government action.[2] The inquiry to determine standing in an action premised on the violation of constitutional or statutory rights is whether the constitutional or statutory provision can be understood as granting persons in the plaintiff's position a right to judicial relief.[3] The standing inquiry is especially rigorous when reaching the merits of the dispute would force the court to decide whether an action taken by one of the other two branches of the federal government was unconstitutional.[4] The Article III standing requirement assures that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party; where that need does not exist, allowing courts to oversee legislative or executive action would significantly alter the allocation of power away from a democratic form of government.[5] Federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution; rather, federal courts sit solely to decide on the rights of individuals and

must refrain from passing upon the constitutionality of an act unless obliged to do so in the proper performance of their judicial function when the question is raised by a party whose interests entitle the party to raise it.[6]

Although the standing inquiry often turns on the nature and source of the claim asserted, it in no way depends on the merits of the plaintiff's contention that particular conduct is illegal.[7] The question of standing generally focuses on the party seeking a forum rather than on the issues to be adjudicated.[8] The essence of the constitutional standing question is whether the plaintiff has a personal stake in the issue presented.[9] A party has standing to challenge a statute's constitutionality if the party has a sufficient interest in the outcome of a justiciable controversy to obtain judicial resolution of that controversy.[10] A party will not be heard to question the validity of a law, or any part of it, unless the party shows that some right of his or hers is impaired or prejudiced thereby,[11] and the interest that he or she seeks to protect must be within the zone of interests to be protected by the statute or constitutional guaranty in question.[12] While one need have only a slight interest to sustain standing where issues of great public interest are presented,[13] a showing only of such interest in the subject of the suit as the public generally has is usually not sufficient to warrant the exercise of judicial power.[14] A plaintiff raising only a generally available grievance about government, claiming only harm to the plaintiff's and every citizen's interest in proper application of the constitution and laws, and seeking relief that no more directly and tangibly benefits him or her than it does the public-at-large does not provide a basis for standing.[15]

A person may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his or her disadvantage.[16] A person to whom a statute has never been applied generally lacks standing to question the constitutionality of the statute.[17] However, in a preenforcement review case under the First Amendment, courts do not closely scrutinize the plaintiff's complaint for Article III standing when the plaintiff claims an interest in engaging in protected speech that implicates, if not violates, each provision of the law at issue; a plaintiff meets the injury-in-fact requirement for standing, and the case is ripe, when the threat of enforcement of that law is sufficiently imminent.[18]

A person who has not performed acts necessary to bring him or her within the operation of a statute may not question its constitutionality.[19]

A person may be required to exhaust other available remedies before instituting a constitutional challenge.[20]

One who attempts to cheat or mislead the government has no standing to assert that the operations of the government in which the effort to cheat or mislead is made are not constitutional.[21]

Intervention.

To be entitled to intervene as of right under the provision of the rule allowing for intervention by an applicant claiming an interest related to the property or transaction underlying the action, with the full rights of a party, including the right to appeal, an applicant's interest must be one on which an independent federal suit could be based, consistent with Article III's requirement that only a case or controversy can be litigated in a federal court at any stage of the proceeding.[22]

CUMULATIVE SUPPLEMENT

Cases:

Given the threat to freedom of expression, traditional rules of standing are altered to permit litigants to challenge a statute restricting speech, under the First Amendment, not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. U.S. Const. Amend. 1. FF Cosmetics FL, Inc. v. City of Miami Beach, 866 F.3d 1290 (11th Cir. 2017).

The Article III standing inquiry is especially rigorous when reaching the merits of the dispute would force a court to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional, particularly in the fields of intelligence gathering and foreign affairs. U.S. Const. art. 3, § 2, cl. 1. Kareem v. Haspel, 986 F.3d 859 (D.C. Cir. 2021).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Whitmore v. Arkansas, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990).
State constitution
The Mississippi Constitution, unlike the United States Constitution, contains no restrictive language limiting judicial review to actual cases and controversies; therefore, the Mississippi Supreme Court is more permissive in granting standing to parties who seek review of governmental actions.
Miss.—Van Slyke v. Board of Trustees of State Institutions of Higher Learning, 613 So. 2d 872, 81 Ed. Law Rep. 382 (Miss. 1993).

2 U.S.—Hines v. Elkhart General Hospital, 465 F. Supp. 421 (N.D. Ind. 1979), judgment aff'd, 603 F.2d 646 (7th Cir. 1979).
Ariz.—Bennett v. Napolitano, 206 Ariz. 520, 81 P.3d 311 (2003).

3 Mont.—Shockley v. Cascade County, 2014 MT 281, 376 Mont. 493, 336 P.3d 375 (2014).

4 U.S.—Burt v. Rumsfeld, 322 F. Supp. 2d 189, 189 Ed. Law Rep. 666 (D. Conn. 2004).

5 U.S.—Summers v. Earth Island Institute, 555 U.S. 488, 129 S. Ct. 1142, 173 L. Ed. 2d 1, 72 Fed. R. Serv. 3d 1183 (2009).

6 U.S.—Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 127 S. Ct. 2553, 168 L. Ed. 2d 424, 44 A.L.R. Fed. 2d 637 (2007).

7 U.S.—Burt v. Rumsfeld, 322 F. Supp. 2d 189, 189 Ed. Law Rep. 666 (D. Conn. 2004).

8 Haw.—Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 861 P.2d 1 (1993).

9 U.S.—H. L. v. Matheson, 450 U.S. 398, 101 S. Ct. 1164, 67 L. Ed. 2d 388 (1981); Ternes v. Galichia, 297 Kan. 918, 305 P.3d 617 (2013).
Alaska—State v. Weidner, 684 P.2d 103 (Alaska 1984).
Wash.—State v. Glenn, 115 Wash. App. 540, 62 P.3d 921 (Div. 2 2003).
Federal jurisdiction
The essence of the standing inquiry is whether a party seeking to invoke federal jurisdiction has alleged such a personal stake in the controversy's outcome as to assure that concrete adverseness that sharpens the presentation of issues upon which a court so largely depends for illumination of difficult constitutional questions.
U.S.—Clatterbuck v. City of Charlottesville, 708 F.3d 549 (4th Cir. 2013).

10 Wis.—State v. City of Oak Creek, 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526 (2000).

11 N.H.—Avery v. New Hampshire Dept. of Educ., 162 N.H. 604, 34 A.3d 712, 275 Ed. Law Rep. 286 (2011).
Constitutional issue
(1) A party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected.
N.H.—Eby v. State, 166 N.H. 321, 96 A.3d 942 (2014).
(2) Standing to challenge the constitutionality of a statute under the federal or state constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing,

the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.

Neb.—State v. Harris, 284 Neb. 214, 817 N.W.2d 258 (2012).

12 U.S.—Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970).

Md.—Kendall v. Howard County, 431 Md. 590, 66 A.3d 684 (2013).

Tex.—In re Houston Chronicle Pub. Co., 64 S.W.3d 103 (Tex. App. Houston 14th Dist. 2001).

Wash.—State v. Johnson, 179 Wash. 2d 534, 315 P.3d 1090 (2014), cert. denied, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014).

Statutory cause of action

U.S.—Lexmark Intern., Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

Pecuniary or personal interest

Proof of a legally protectable interest, as required to challenge the constitutionality of a statute, requires a showing of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief.

Mo.—Brehm v. Bacon Tp., 426 S.W.3d 1 (Mo. 2014).

13 N.J.—Jordan v. Horsemen's Benev. and Protective Ass'n, 90 N.J. 422, 448 A.2d 462 (1982).

Wis.—State v. I, A Woman-Part II, 53 Wis. 2d 102, 191 N.W.2d 897 (1971).

As to the "public interest" exception to the rule that a person may raise a constitutional question only if he or she has been injured by the statute or action in question, see § 166.

14 U.S.—Plumas County Bd. of Sup'rs v. Califano, 594 F.2d 756 (9th Cir. 1979).

Tex.—Texas Dept. of Transp. v. City of Sunset Valley, 146 S.W.3d 637 (Tex. 2004).

15 Iowa—Alons v. Iowa Dist. Court for Woodbury County, 698 N.W.2d 858 (Iowa 2005).

16 Neb.—Nebraska Accountability and Disclosure Commission v. Skinner, 288 Neb. 804, 853 N.W.2d 1 (2014).

17 U.S.—Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984).

18 § 161.

19 Mich.—Davis v. Green Oak Tp., 65 Mich. App. 188, 237 N.W.2d 241 (1975).

20 U.S.—Lerner v. Casey, 357 U.S. 468, 78 S. Ct. 1311, 2 L. Ed. 2d 1423 (1958).

21 U.S.—Dennis v. U.S., 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966).

22 U.S.—Aurora Loan Services, Inc. v. Craddieth, 442 F.3d 1018 (7th Cir. 2006).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

1. In General

§ 159. Requirement of standing—Standing to assert partial invalidity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 665, 666, 668 to 671, 673 to 675

A person whose rights are affected by one portion of a statute may not question the constitutionality of another portion where the operation of the provision affecting him or her will not be influenced by the validity or invalidity of the contested provision.

A person whose rights are affected by one portion of a statute may not question the constitutionality of another portion where the operation of the provision affecting him or her will not be influenced by the validity or invalidity of the contested provision.[1] Thus, a party may not raise a constitutional challenge to a provision of a statute that does not affect him or her; however, that person may raise a constitutional objection to the other part where its invalidity will render the entire statute void.[2] Furthermore, a lack of standing as to some statutory provisions does not impair the ability of a party to question the validity of another provision which is severable[3] although he or she may not question those provisions which cause him or her no harm.[4]

Footnotes

1 Ariz.—In re Dos Cabezas Power Dist., 17 Ariz. App. 414, 498 P.2d 488 (Div. 2 1972).
La.—State v. Thomas, 891 So. 2d 1233 (La. 2005).
Tex.—Johnson v. State, 853 S.W.2d 527 (Tex. Crim. App. 1992).
Effect of saving clause
Where a statute contains a saving clause providing that partial invalidity shall not destroy the act, invalidity of specific portions of act may be raised only by a person adversely affected by them.
S.D.—Mundell v. Graph, 62 S.D. 631, 256 N.W. 121 (1934).
Regulation
Standing to challenge certain provisions of a regulation does not provide plaintiff a passport to explore the constitutionality of every provision.
D.C.—Padou v. District of Columbia, 77 A.3d 383 (D.C. 2013).
2 Ill.—In re M.I., 2013 IL 113776, 370 Ill. Dec. 785, 989 N.E.2d 173 (Ill. 2013), cert. denied, 134 S. Ct. 442, 187 L. Ed. 2d 296 (2013).
3 U.S.—Smith v. Bentley, 493 F. Supp. 916 (E.D. Ark. 1980).
4 U.S.—Bell v. Hongisto, 501 F.2d 346 (9th Cir. 1974).

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1. In General

§ 160. Requirement of standing—Cases involving permits

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 665, 666, 668 to 671, 673 to 675

While a plaintiff challenging a statute relating to the acquiring of permits should ordinarily comply with the statutory requirements, under certain circumstances, the plaintiff need not apply for a permit before challenging the constitutionality of the statute.

While a plaintiff challenging a statute relating to the acquiring of permits should ordinarily comply with the statutory requirements,[1] under certain circumstances, the plaintiff need not apply for a permit before challenging the constitutionality of the statute,[2] particularly in the area of First Amendment freedoms.[3] Delay in processing an application for a billboard permit may be sufficient to convey standing to bring a First Amendment challenge against an ordinance's lack of any requirement for the timely processing of permit applications regardless of the fact that the application ultimately would have been denied for failure to meet ordinance requirements; the injury of not having an application timely processed is distinct from the injury of ultimate denial of an application.[4]

Footnotes

1 Minn.—State Dept. of Natural Resources v. Olson, 275 N.W.2d 585 (Minn. 1979).

2 U.S.—Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981).
Cal.—City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 164 Cal. Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219 (1980).

3 U.S.—Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981).
N.J.—State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 733 A.2d 1159 (1999).

4 U.S.—Covenant Media Of SC, LLC v. City Of North Charleston, 493 F.3d 421 (4th Cir. 2007).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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C. Persons Entitled to Raise Constitutional Questions

1. In General

§ 161. Necessity of injury

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 672

In order to possess standing to challenge the constitutionality of legislation or other governmental action, the claimant must be injured in fact.

In order to have standing to contest the validity of legislation or governmental action, the claimant must show that he or she has been injured in fact and that he or she has been deprived of a constitutional right[1] or that he or she has sustained, or is in immediate danger of sustaining, injury as a result of the law or other governmental action[2] or belongs to a class which is prejudiced by the governmental action.[3] The claimant's rights must be actually or directly affected, aggrieved, or injured;[4] there must be a causal link between the injury and the challenged provision;[5] and the injury must be likely to be redressed by a favorable decision.[6] To meet redressability standing requirement on a challenge to the constitutionality of a statute, it must be the effect of the court's judgment on the defendant that redresses the plaintiffs' injury whether directly or indirectly.[7] The party seeking to have the statute or action declared unconstitutional must not only show that he or she is or will be injured by it but also show how and in what respect he or she is or will be injured and prejudiced by it.[8] As a general matter, a plaintiff who

wishes to engage in conduct arguably protected by the Constitution, but proscribed by a statute, successfully demonstrates an immediate risk of injury as required for standing.[9]

The injury need not be an economic one,[10] but the interest asserted must be a legally protected one,[11] which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.[12] The appropriate inquiry on a standing question is whether the plaintiff has in fact suffered injury to a legally protected interest as contemplated by statutory or constitutional provisions.[13] Standing to challenge the constitutionality of a statute under the federal or state constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.[14]

A party has standing to challenge the constitutional validity of a statute if he or she has sustained or is in immediate danger of sustaining some direct injury as a result of enforcement of the statute.[15] A constitutional question may not be raised by one whose rights are not directly and certainly affected[16] or where no attempt is being made to enforce the provision attacked.[17] In the absence of facts demonstrating an unconstitutional application of a statute, a person may not challenge the statute on the ground that it might conceivably be applied unconstitutionally in some hypothetical case; rather, a person must be directly or materially affected by the attacked provision, and they must be in immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute.[18] A party challenging the constitutionality of a law must show that the law is, or is about to be, applied to his or her disadvantage.[19] However, in a preenforcement review case under the First Amendment, courts do not closely scrutinize the plaintiff's complaint for Article III standing when the plaintiff claims an interest in engaging in protected speech that implicates, if not violates, each provision of the law at issue; a plaintiff meets the injury-in-fact requirement for standing, and the case is ripe, when the threat of enforcement of that law is sufficiently imminent.[20] When plaintiffs file a preenforcement, constitutional challenge to a state statute, the injury requirement for standing may be satisfied by establishing a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement.[21]

A plaintiff who wishes to challenge the constitutionality of a law need not confess that he or she will in fact violate that law in order to have Article III standing.[22] Threatened administrative action, like arrest or prosecution, may give rise to Article III harm sufficient to justify preenforcement review of the constitutionality of a challenged statute.[23]

Once a court declares a statute facially unconstitutional and enjoins its enforcement by the state, any risk of injury from enforcement of the law ends, and an Article III injury does not arise from the possibility that the statute contains still another constitutional flaw.[24]

CUMULATIVE SUPPLEMENT

Cases:

Landside marine terminal operator suffered injury in fact as required for constitutional standing to bring action against Port Authority of New York and New Jersey, asserting that rent due under operator's lease with Port Authority violated constitution's Tonnage Clause, Rivers and Harbors Appropriation Act (RHA), and the Water Resources Development Act (WRDA); even if operator passed rental fees on to vessels for which it loaded and unloaded cargo, operator itself was still responsible for the fees. U.S.C.A. Const. Art. 1, § 10, cl. 3; 33 U.S.C.A. § 5(b); Harbor Development and Navigation Improvement Act of 1986, § 208, 33 U.S.C.A. § 2236. Maher Terminals, LLC v. Port Authority of New York and New Jersey, 805 F.3d 98 (3d Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Gange Lumber Co. v. Rowley, 326 U.S. 295, 66 S. Ct. 125, 90 L. Ed. 85 (1945); Doe v. Porter, 370 F.3d 558, 188 Ed. Law Rep. 100, 58 Fed. R. Serv. 3d 901, 2004 FED App. 0171P (6th Cir. 2004).
Ark.—Stokes v. Stokes, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981).
Neb.—Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist., 250 Neb. 442, 550 N.W.2d 907 (1996).
Establishment of religion
(1) Enforcement of the Establishment Clause does not demand a special exception from requirement that plaintiff allege distinct and palpable injury to himself or herself that is likely to be redressed if the requested relief is to be granted.
U.S.—Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982).
(2) Prisoners may establish an injury, required for standing to bring an Establishment Clause claim, if they allege they altered their behavior and had direct, offensive, and alienating contact with a government-funded religious program.
U.S.—Patel v. U.S. Bureau of Prisons, 515 F.3d 807 (8th Cir. 2008).

2 U.S.—Allen v. Wright, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556, 18 Ed. Law Rep. 82 (1984) (abrogated on other grounds by, Lexmark Intern., Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)).
Ala.—Town of Cedar Bluff v. Citizens Caring for Children, 904 So. 2d 1253 (Ala. 2004).
Ga.—Agan v. State, 272 Ga. 540, 533 S.E.2d 60 (2000).
Iowa—In re Morrow, 616 N.W.2d 544 (Iowa 2000).
Mo.—State v. Entertainment Ventures I, Inc., 44 S.W.3d 383 (Mo. 2001).
Mont.—State v. Webb, 2005 MT 5, 325 Mont. 317, 106 P.3d 521 (2005).
Neb.—State v. Gales, 269 Neb. 443, 694 N.W.2d 124 (2005).
N.C.—Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

3 Ark.—Hamilton v. Hamilton, 317 Ark. 572, 879 S.W.2d 416 (1994).
La.—Whitnell v. Silverman, 686 So. 2d 23 (La. 1996).
Neb.—State v. Hookstra, 263 Neb. 116, 638 N.W.2d 829 (2002).
As to standing to raise a third party's rights, see §§ 164 to 169.

4 U.S.—Laird v. Tatum, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972); Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981).
Ala.—Town of Cedar Bluff v. Citizens Caring for Children, 904 So. 2d 1253 (Ala. 2004).
Mont.—State v. Webb, 2005 MT 5, 325 Mont. 317, 106 P.3d 521 (2005).
N.C.—Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).
Constitutional challenge to statute
(1) To challenge the constitutionality of a statute, the defendant must have been directly affected by the alleged defect, and he or she does not have standing to argue that a statute is unconstitutional as applied to third parties in hypothetical situations.
Kan.—State v. Coman, 294 Kan. 84, 273 P.3d 701 (2012).
(2) An individual who is not affected by the challenged statute lacks standing to bring a constitutional challenge thereto.
Neb.—State v. Lamb, 280 Neb. 738, 789 N.W.2d 918 (2010).

5 Ala.—Town of Cedar Bluff v. Citizens Caring for Children, 904 So. 2d 1253 (Ala. 2004).
Ohio—Ohio Trucking Assn. v. Charles, 134 Ohio St. 3d 502, 2012-Ohio-5679, 983 N.E.2d 1262 (2012).
Utah—Midvale City Corp. v. Haltom, 2003 UT 26, 73 P.3d 334 (Utah 2003).

6 U.S.—McConnell v. Federal Election Com'n, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (overruled on other grounds by, Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)).
Ala.—Stiff v. Alabama Alcoholic Beverage Control Bd., 878 So. 2d 1138 (Ala. 2003).
D.C.—Grayson v. AT & T Corp., 15 A.3d 219 (D.C. 2011).

7 U.S.—Coll v. First American Title Ins. Co., 642 F.3d 876, 79 Fed. R. Serv. 3d 455 (10th Cir. 2011).

8 Ala.—Town of Cedar Bluff v. Citizens Caring for Children, 904 So. 2d 1253 (Ala. 2004).

9 U.S.—Bell v. Keating, 697 F.3d 445 (7th Cir. 2012).

10 U.S.—Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

11 Ala.—Town of Cedar Bluff v. Citizens Caring for Children, 904 So. 2d 1253 (Ala. 2004).
Utah—Midvale City Corp. v. Haltom, 2003 UT 26, 73 P.3d 334 (Utah 2003).
Wis.—McConkey v. Van Hollen, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855 (2010).

12 D.C.—Grayson v. AT & T Corp., 15 A.3d 219 (D.C. 2011).

13 Okla.—Murray County v. Homesales, Inc., 2014 OK 52, 330 P.3d 519 (Okla. 2014).

14 Neb.—State v. Lamb, 280 Neb. 738, 789 N.W.2d 918 (2010).

15 Ill.—People v. Olender, 222 Ill. 2d 123, 305 Ill. Dec. 1, 854 N.E.2d 593 (2005).

16 U.S.—Barrows v. Jackson, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953).
Alaska—Hampton v. State, 569 P.2d 138 (Alaska 1977).

17 U.S.—New York Civil Service Commission v. Snead, 425 U.S. 457, 96 S. Ct. 1630, 48 L. Ed. 2d 88 (1976); D.L.S. v. Utah, 374 F.3d 971 (10th Cir. 2004).

18 Ill.—In re M.I., 2013 IL 113776, 370 Ill. Dec. 785, 989 N.E.2d 173 (Ill. 2013), cert. denied, 134 S. Ct. 442, 187 L. Ed. 2d 296 (2013).

19 Minn.—McCaughtry v. City of Red Wing, 808 N.W.2d 331 (Minn. 2011).
Neb.—Nebraska Accountability and Disclosure Commission v. Skinner, 288 Neb. 804, 853 N.W.2d 1 (2014).

20 U.S.—Platt v. Board of Com'rs on Grievances and Discipline of Ohio Supreme Court, 769 F.3d 447 (6th Cir. 2014).

Causation

When a plaintiff brings a preenforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess the authority to enforce the complained-of provision.

U.S.—Cressman v. Thompson, 719 F.3d 1139 (10th Cir. 2013).

21 U.S.—Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012).

22 U.S.—Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014).

23 U.S.—Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014).

24 U.S.—Platinum Sports Ltd. v. Snyder, 715 F.3d 615 (6th Cir. 2013).

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§ 162. Necessity of injury—First Amendment claims

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 672

Where a constitutional challenge is based on the first Amendment, plaintiffs may establish an injury-in-fact without first suffering a direct injury from the challenged restriction.

Because constitutional challenges based on the First Amendment present unique standing considerations, plaintiffs may establish an injury-in-fact without first suffering a direct injury from the challenged restriction.[1] To establish injury-in-fact for a First Amendment challenge to a state statute, the plaintiff needs only to establish that he or she would like to engage in arguably protected speech but is chilled from doing so by the existence of the statute; self-censorship can itself constitute injury-in-fact.[2] While a plaintiff cannot satisfy the injury-in-fact requirement for a First Amendment prior restraint claim through the mere allegation that the restraint has a subjective chilling effect on his or her speech or association, a chilling effect on the exercise of a plaintiff's First Amendment rights may amount to a judicially cognizable injury-in-fact as long as it arises from an objectively justified fear of real consequences.[3]

CUMULATIVE SUPPLEMENT

Cases:

To establish a sufficient injury to have standing to assert a First Amendment prior-restraint claim, a plaintiff must show that he is in fact subject to a prior restraint on protected expression. U.S. Const. art. 3, § 2, cl. 1.; U.S. Const. Amend. 1. Phillips v. DeWine, 841 F.3d 405 (6th Cir. 2016).

Retail business owners suffered pre-enforcement injury, as required to establish standing to challenge California statute, prohibiting retailers from imposing surcharge on customers who use a credit card in lieu of payment by cash, check, or similar means, as violative of the First Amendment; even though no legal proceedings had been brought against owners and there had been no history of prior enforcement of the statute generally, owners had modified their commercial speech and behavior based on credible threat of enforcement of statute, as they desired to, but did not, impose additional fee on credit card purchases due to fear of enforcement action against them, and California Attorney General did not rule out enforcement. U.S. Const. Amend. 1, 14; Cal. Civ. Code § 1748.1. Italian Colors Restaurant v. Becerra, 878 F.3d 1165 (9th Cir. 2018).

Individual failed to adequately allege credible threat of enforcement of Illinois order of protection statute, and thus failed to adequately allege injury in fact needed for Article III standing to raise claim against future enforcement of statute based on its alleged violation of First and Fourteenth Amendments' respective free speech and due process guarantees, although he alleged that he feared being prosecuted under statute were he to make legitimate court filings and public records requests since he had previously been convicted under statute for sending materials to protected party's attorney, where such materials had included thousands of pages of emails with irrelevant and personal information; conduct in which individual wished to engage differed from that underlying conviction. U.S. Const. art. 3; U.S. Const. Amends. 1, 14; 750 Ill. Comp. Stat. Ann. 60/103(7), 60/214(b). Calabrese v. Foxx, 338 F. Supp. 3d 775 (N.D. Ill. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Lopez v. Candaele, 630 F.3d 775, 264 Ed. Law Rep. 85 (9th Cir. 2010).

2 U.S.—281 Care Committee v. Arneson, 766 F.3d 774 (8th Cir. 2014), cert. denied, 2015 WL 1280248 (U.S. 2015).

Registered sex offenders

Registered sex offenders had standing to challenge a Louisiana statute precluding registered sex offenders from using or accessing social networking websites, chat rooms, and peer-to-peer networks on First Amendment free speech grounds; the plaintiffs asserted that their self-censorship of Internet activity in light of the statute had a substantial chilling effect on their First Amendment rights.

U.S.—Doe v. Jindal, 853 F. Supp. 2d 596 (M.D. La. 2012).

Disciplinary proceedings

The treat of disciplinary action may be sufficient, even in the absence of criminal penalties, for purposes of establishing that there is a credible threat of prosecution so as to establish a cognizable self-censorship injury to support standing on a First Amendment claim.

U.S.—Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014).

3 U.S.—Brammer-Hoelter v. Twin Peaks Charter Academy, 602 F.3d 1175, 256 Ed. Law Rep. 71 (10th Cir. 2010).

16 C.J.S. Constitutional Law § 163

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

1. In General

§ 163. Facial and as-applied challenges

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 656, 657

A person may challenge the constitutionality of a statute as applied to him or her, and a person may bring a constitutional challenge to a statute if the entire statute is invalid.

A party may generally challenge the constitutionality of a statute only as applied to that party,[1] and such a challenge is referred to as an "as applied" challenge.[2] In an as-applied challenge to the constitutionality of a law, a court assesses the merits of the challenge by considering the facts of the particular case, not hypothetical facts in other situations; under such a challenge, the challenger must show that his or her constitutional rights were actually violated.[3] A plaintiff generally cannot prevail on an as-applied challenge without showing that the law has in fact been, or is sufficiently likely to be, unconstitutionally applied to him or her; specifically, when someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, the plaintiff must show that he or she was prevented from speaking while someone espousing another viewpoint was permitted to do so.[4] As general rule, a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before

the court.[5] The more difficult plight of a different or hypothetical litigant will not save a litigant's as-applied challenge to the constitutionality of a statute.[6]

A facial challenge to the constitutional validity of a statute considers only the text of the measure itself and not its application to the particular circumstances of an individual.[7] A party asserting a facial challenge to a statute seeks to vindicate not only his or her own rights but also those of others who may also be adversely impacted by the statute in question.[8] A plaintiff can succeed in a facial challenge to the constitutionality of a law, outside the First Amendment context, only by establishing that no set of circumstances exists under which the law would be valid, that is, that law is unconstitutional in all of its applications.[9] On a facial challenge to the constitutionality of a law, the court must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases.[10] If a statute is constitutional as applied to a litigant, he or she lacks standing to assert a facial constitutional challenge to it, and the statute is not facially unconstitutional as it has at least one constitutional application.[11] In order to challenge successfully the facial validity of a statute or a rule of practice when no fundamental constitutional right is implicated, a party is required to demonstrate as a threshold matter that the statute may not be applied constitutionally to the facts of his or her case.[12] A person may bring a facial challenge to a statute if the unconstitutional feature is so pervasive as to render the entire statute invalid[13] and if the statute reaches a substantial amount of protected conduct.[14]

Footnotes

1 Ark.—Ghegan & Ghegan, Inc. v. Weiss, 338 Ark. 9, 991 S.W.2d 536 (1999).
Haw.—Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 861 P.2d 1 (1993).
Iowa—State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002).
N.Y.—Village of Valatie v. Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994).
N.D.—Olson v. Bismarck Parks and Recreation Dist., 2002 ND 61, 642 N.W.2d 864 (N.D. 2002).
Tex.—Dinkins v. State, 894 S.W.2d 330 (Tex. Crim. App. 1995).
Wis.—State v. Stevenson, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90 (2000).

2 Cal.—Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 (1995).

3 Wis.—League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302 (2014).

4 U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

5 Mo.—State v. Jeffrey, 400 S.W.3d 303 (Mo. 2013).

6 Tex.—Tenet Hospitals Ltd. v. Rivera, 445 S.W.3d 698 (Tex. 2014).
As to third-party standing, generally, see §§ 164 to 169.

7 Cal.—Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 (1995).
Ohio—Global Knowledge Training, L.L.C. v. Levin, 127 Ohio St. 3d 34, 2010-Ohio-4411, 936 N.E.2d 463 (2010).

8 U.S.—City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).

9 U.S.—Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).
Ga.—Sentinel Offender SVCS., LLC v. Glover, 296 Ga. 315, 766 S.E.2d 456 (2014).
First Amendment
On a facial challenge in the First Amendment context, a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.
U.S.—New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).
State constitution

A party bringing a facial challenge to a statute under the Ohio State Constitution must demonstrate that there is no set of circumstances in which the statute would be valid.

U.S.—Fencorp, Co. v. Ohio Kentucky Oil Corp., 675 F.3d 933, 82 Fed. R. Serv. 3d 89 (6th Cir. 2012).

Criminal statute

In deciding the merits of a facial challenge to the constitutionality of a criminal statute, the defendant's personal situation becomes irrelevant; it is enough that the court has only the statute itself and the statement of basis and purpose that accompanied its promulgation.

D.C.—Conley v. U.S., 79 A.3d 270 (D.C. 2013).

10 U.S.—Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).

11 Va.—Toghill v. Com., 768 S.E.2d 674 (Va. 2015).

12 Conn.—Thalheim v. Town of Greenwich, 256 Conn. 628, 775 A.2d 947 (2001).

Vagueness

To be vague in all of its applications, and thus unconstitutionally vague on its face under Due Process Clause, a statute must necessarily be vague as to the litigant; hence, if the statute is not vague as to the litigant, a due process challenge must necessarily fail as a person who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.

Tex.—Sanchez v. State, 995 S.W.2d 677 (Tex. Crim. App. 1999).

13 Ill.—People v. Morgan, 203 Ill. 2d 470, 272 Ill. Dec. 160, 786 N.E.2d 994 (2003) (overruled on other grounds by, People v. Sharpe, 216 Ill. 2d 481, 298 Ill. Dec. 169, 839 N.E.2d 492 (2005)).

14 Iowa—State v. Dalton, 674 N.W.2d 111 (Iowa 2004).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

2. Assertion of Rights of Third Parties

a. In General

§ 164. General prohibition against assertion of rights of third parties

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 667

Generally, a person who challenges the constitutionality of a statute or governmental action may assert only his or her own constitutional rights, not the rights of others.

Generally, a person may assert only his or her own constitutional rights, rather than those of third parties,[1] and in order that a person have standing to challenge the constitutionality of a statute or government action, his or her own rights must be adversely affected by the statute or action,[2] or it must affirmatively appear that the he or she comes within the class of persons affected by it.[3] Accordingly, with some exceptions,[4] a person is precluded from challenging the constitutionality of a statute or governmental action that is constitutional as applied to him or her on the ground that it could be unconstitutionally applied to others in different circumstances.[5] As a general matter, persons not themselves the victims of illegal government conduct typically lack standing to assert the constitutional rights of others.[6] For instance, a corporation has no standing to assert the constitutional rights of its employees;[7] a bank lacks standing to assert the due process rights of its depositors;[8] and an attorney

has no right to claim deprivation of a constitutional right based upon his or her representation of a client[9] unless the attorney is personally affected by the alleged deprivation.[10]

This rule reflects two cardinal principles of constitutional order, the personal nature of constitutional rights and the prudential limitations on constitutional adjudication,[11] and frees the court from unnecessary pronouncement on constitutional issues and from premature interpretations of statutes in areas where their constitutional application might be cloudy and assures the court that the issues will be concrete and sharply presented.[12]

Footnotes

1 U.S.—McGowan v. State of Md., 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), for additional opinion, see, 366 U.S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393 (1961).
Ark.—Urrey Ceramic Tile Co., Inc. v. Mosley, 304 Ark. 711, 805 S.W.2d 54 (1991).
D.C.—Nowak v. Trezevant, 685 A.2d 753 (D.C. 1996).
Fla.—Sieniarecki v. State, 756 So. 2d 68 (Fla. 2000).
Ga.—State v. Jackson, 269 Ga. 308, 496 S.E.2d 912 (1998).
Haw.—Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 861 P.2d 1 (1993).
Ill.—State v. Funches, 212 Ill. 2d 334, 288 Ill. Dec. 654, 818 N.E.2d 342 (2004).
Iowa—State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002).
Ky.—Associated Industries of Kentucky v. Com., 912 S.W.2d 947 (Ky. 1995).
Md.—In re Lee, 132 Md. App. 696, 754 A.2d 426 (2000).
Mass.—Blixt v. Blixt, 437 Mass. 649, 774 N.E.2d 1052 (2002).
Me.—State v. York, 1997 ME 209, 704 A.2d 324 (Me. 1997).
Mont.—In re B.F., 2004 MT 61, 320 Mont. 261, 87 P.3d 427 (2004).
Nev.—Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997).
N.H.—Hughes v. New Hampshire Div. of Aeronautics, 152 N.H. 30, 871 A.2d 18 (2005).
N.M.—Gunaji v. Macias, 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008 (2001).
Okla.—Forest Oil Corp. v. Corporation Com'n of Oklahoma, 1990 OK 58, 807 P.2d 774 (Okla. 1990).
Tex.—Texas Workers' Compensation Com'n v. Garcia, 893 S.W.2d 504 (Tex. 1995).
Utah—Shelledy v. Lore, 836 P.2d 786 (Utah 1992).
Wis.—Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund, 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849 (2000).

2 U.S.—Clements v. Fashing, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982).
Alaska—Anchorage School Dist. v. Murdock, 873 P.2d 1291, 91 Ed. Law Rep. 373 (Alaska 1994).
Conn.—City Recycling, Inc. v. State, 247 Conn. 751, 725 A.2d 937 (1999).
Ga.—Adams v. Georgia Dept. of Corrections, 274 Ga. 461, 553 S.E.2d 798 (2001).
Ill.—In re M.I., 2013 IL 113776, 370 Ill. Dec. 785, 989 N.E.2d 173 (Ill. 2013), cert. denied, 134 S. Ct. 442, 187 L. Ed. 2d 296 (2013).
Kan.—State v. Coman, 294 Kan. 84, 273 P.3d 701 (2012).
La.—Greater New Orleans Expressway Com'n v. Olivier, 892 So. 2d 570 (La. 2005).
Mo.—Lester v. Sayles, 850 S.W.2d 858 (Mo. 1993).
Tex.—Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996).
W. Va.—State v. James, 227 W. Va. 407, 710 S.E.2d 98 (2011).
Wis.—State v. Stevenson, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90 (2000).
Wyo.—Cathcart v. Meyer, 2004 WY 49, 88 P.3d 1050 (Wyo. 2004).

3 U.S.—Rosario v. Rockefeller, 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973).
Colo.—City of Greenwood Village v. Petitioners for Proposed City of Centennial, 3 P.3d 427 (Colo. 2000).
Conn.—Town of Berlin v. Santaguida, 181 Conn. 421, 435 A.2d 980 (1980).
Ga.—Smith v. Gwinnett County, 248 Ga. 882, 286 S.E.2d 739 (1982).
N.Y.—Liss v. Ross, 80 A.D.2d 716, 437 N.Y.S.2d 731 (3d Dep't 1981).

N.C.—Twin City Apartments, Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).
Pa.—Philadelphia Facilities Management Corp. v. Biester, 60 Pa. Commw. 366, 431 A.2d 1123 (1981).

4 Discussed in §§ 116, 169.

5 U.S.—Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999).
Alaska—Smith v. State, Dept. of Corrections, 872 P.2d 1218 (Alaska 1994).
Ariz.—State v. Musser, 194 Ariz. 31, 977 P.2d 131 (1999).
Conn.—City Recycling, Inc. v. State, 247 Conn. 751, 725 A.2d 937 (1999).
Fla.—Sieniarecki v. State, 756 So. 2d 68 (Fla. 2000).
Ga.—Sliney v. State, 260 Ga. 167, 391 S.E.2d 114 (1990).
Haw.—Freitas v. Administrative Director of Courts, 104 Haw. 483, 92 P.3d 993 (2004).
Idaho—State v. Davis, 135 Idaho 747, 24 P.3d 64 (2001).
Ill.—People v. Williams, 235 Ill. 2d 178, 336 Ill. Dec. 237, 920 N.E.2d 446 (2009).
Ky.—Martin v. Com., 96 S.W.3d 38 (Ky. 2003).
La.—State v. Sandifer, 679 So. 2d 1324 (La. 1996).
Md.—McKenzie v. State, 131 Md. App. 124, 748 A.2d 67, 143 Ed. Law Rep. 273 (2000).
Mass.—Blixt v. Blixt, 437 Mass. 649, 774 N.E.2d 1052 (2002).
Miss.—Bullock v. Mississippi Employment Sec. Com'n, 697 So. 2d 1147 (Miss. 1997).
Mo.—State v. Faruqi, 344 S.W.3d 193 (Mo. 2011); State v. Mahan, 971 S.W.2d 307 (Mo. 1998).
N.Y.—People v. Foley, 94 N.Y.2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123 (2000).
Okla.—Wilkins v. State, 1999 OK CR 27, 985 P.2d 184 (Okla. Crim. App. 1999).
R.I.—Moreau v. Flanders, 15 A.3d 565 (R.I. 2011); In re Advisory From the Governor, 633 A.2d 664 (R.I. 1993).
S.D.—State v. Jensen, 2003 SD 55, 662 N.W.2d 643 (S.D. 2003).
Tex.—Texas Workers' Compensation Com'n v. Garcia, 893 S.W.2d 504 (Tex. 1995).
Vt.—State v. Dann, 167 Vt. 119, 702 A.2d 105 (1997).
Wash.—City of Seattle v. Montana, 129 Wash. 2d 583, 919 P.2d 1218 (1996).
Wis.—State v. Konrath, 218 Wis. 2d 290, 577 N.W.2d 601 (1998).
Wyo.—Cathcart v. Meyer, 2004 WY 49, 88 P.3d 1050 (Wyo. 2004).

6 Mass.—Com. v. Burgos, 462 Mass. 53, 965 N.E.2d 854 (2012).

7 U.S.—OKC Corp. v. Williams, 489 F. Supp. 576 (N.D. Tex. 1980), judgment aff'd, 614 F.2d 58 (5th Cir. 1980).
Kan.—State ex rel. Londerholm v. American Oil Co., 202 Kan. 185, 446 P.2d 754 (1968).

8 Va.—First Virginia Bank v. O'Leary, 251 Va. 308, 467 S.E.2d 775 (1996).

9 U.S.—DePaoli v. Carlton, 878 F. Supp. 1351 (E.D. Cal. 1995).
Conn.—Statewide Grievance Committee v. Whitney, 227 Conn. 829, 633 A.2d 296 (1993).

Hypothetical clients

Attorneys lacked third-party standing on behalf of hypothetical future clients to challenge constitutionality of state statute denying appellate counsel to criminal defendants who pleaded guilty or nolo contendere.
U.S.—Kowalski v. Tesmer, 543 U.S. 125, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004).

10 U.S.—Caplin & Drysdale, Chartered v. U.S., 491 U.S. 617, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989) (the attorney of a defendant whose assets needed to pay attorney's fees were forfeited had standing to advance the defendant's Sixth Amendment rights in that the attorney had a stake in the forfeited assets, and it was credibly alleged that the forfeiture statute at issue might materially impair the ability of persons in the defendant's position to exercise their constitutional rights).

11 U.S.—Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999).

First Amendment

Due to prudential limitations on standing, a party, under ordinary circumstances, may not assert the First Amendment rights of a third party.
U.S.—Coggeshall v. Massachusetts Bd. of Registration of Psychologists, 604 F.3d 658 (1st Cir. 2010).

12 U.S.—Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984).

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16 C.J.S. Constitutional Law § 165

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Constitutional Law
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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

2. Assertion of Rights of Third Parties

a. In General

§ 165. Challenges for vagueness

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 735

A person seeking to challenge a statute for vagueness generally has standing to do so only as it applies to his or her own conduct.

The traditional rule of standing applies to a challenge to a statute on grounds of unconstitutional vagueness.[1] Thus, in order to challenge a statute for vagueness, a litigant must show that the statute is vague as applied to his or her conduct,[2] and he or she has standing where such a showing is made.[3] A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.[4] Whether a statute is vague, in violation of due process, is considered as applied to the particular facts at issue since a plaintiff who engages in some conduct that is clearly proscribed cannot complain of vagueness of the law as applied to the conduct of others.[5] Where a statute or regulation is clear as applied to a person, he or she cannot challenge the statute on the ground that it is facially vague or vague as applied to others,[6] in the absence of the regulation of a First Amendment freedom.[7]

The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.[8]

CUMULATIVE SUPPLEMENT

Cases:

A plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim. U.S.C.A. Const.Amend. 1. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017).

Computer Fraud and Abuse Act section criminalizing the act of intentionally causing damage without authorization to a protected computer was not unconstitutionally vague as applied to defendant who engaged in a weekend campaign of electronic sabotage on his employer's computers while he was employed as an information technology operations manager before resigning and going to Brazil; defendant's conduct was a paradigmatic application of the section. 18 U.S.C.A. § 1030(a)(5)(A). United States v. Thomas, 877 F.3d 591 (5th Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 Neb.—State v. Hookstra, 263 Neb. 116, 638 N.W.2d 829 (2002).

2 U.S.—Aiello v. City of Wilmington, Del., 623 F.2d 845 (3d Cir. 1980).
Mass.—Com. v. Guest, 12 Mass. App. Ct. 941, 425 N.E.2d 779 (1981).
Mont.—State v. Crisp, 249 Mont. 199, 814 P.2d 981 (1991).
N.D.—State v. Ness, 2009 ND 182, 774 N.W.2d 254 (N.D. 2009).
Ohio—In re Complaint Against Harper, 77 Ohio St. 3d 211, 673 N.E.2d 1253 (1996).

3 U.S.—Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981).
Fla.—State v. Hamilton, 388 So. 2d 561 (Fla. 1980).
Ill.—People v. Burpo, 164 Ill. 2d 261, 207 Ill. Dec. 503, 647 N.E.2d 996 (1995).
Neb.—State v. Connely, 243 Neb. 319, 499 N.W.2d 65 (1993).
Va.—Stanley v. City of Norfolk, 218 Va. 504, 237 S.E.2d 799 (1977).

4 Neb.—State v. Scott, 284 Neb. 703, 824 N.W.2d 668 (2012).

5 U.S.—Holder v. Humanitarian Law Project, 561 U.S. 1, 130 S. Ct. 2705, 177 L. Ed. 2d 355, 49 A.L.R. Fed. 2d 567 (2010); 1-800-411-Pain Referral Service, LLC v. Otto, 744 F.3d 1045 (8th Cir. 2014); Hunt v. City of Los Angeles, 638 F.3d 703 (9th Cir. 2011).
Ark.—Law v. State, 375 Ark. 505, 292 S.W.3d 277 (2009).
Conn.—Shanahan v. Department of Environmental Protection, 305 Conn. 681, 47 A.3d 364 (2012).
Fla.—State v. Catalano, 104 So. 3d 1069 (Fla. 2012).
Ga.—Parker v. City of Glennville, 288 Ga. 34, 701 S.E.2d 182 (2010).
Ky.—Blue Movies, Inc. v. Louisville/Jefferson County Metro Government, 317 S.W.3d 23 (Ky. 2010).
Neb.—State v. Loyuk, 289 Neb. 967, 857 N.W.2d 833 (2015).
Nev.—Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502, 2009 Nev. 39, 217 P.3d 546 (2009).
S.C.—State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012).
Va.—Muhammad v. Com., 269 Va. 451, 619 S.E.2d 16 (2005).
Alcoholic beverages
A statute governing restrictions on the sale of alcoholic beverages was not unconstitutionally vague; the bartender who violated statute by serving an intoxicated patron engaged in conduct that was clearly prescribed, and thus the statute was not vague as applied, and the owner of the bar could not complain of the vagueness of the law as applied to the conduct of others.

Idaho—Alcohol Beverage Control v. Boyd, 148 Idaho 944, 231 P.3d 1041 (2010).

6 U.S.—Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

Ariz.—Soto v. Superior Court In and For County of Maricopa (State ex rel. Romley), 190 Ariz. 450, 949 P.2d 539 (Ct. App. Div. 1 1997).

Ark.—Ross v. State, 347 Ark. 334, 64 S.W.3d 272 (2002).

Cal.—Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 (1995).

Conn.—State v. Indrisano, 228 Conn. 795, 640 A.2d 986 (1994).

Fla.—Sieniarecki v. State, 756 So. 2d 68 (Fla. 2000).

Ga.—Mann v. State, 278 Ga. 442, 603 S.E.2d 283 (2004).

Haw.—State v. Bates, 84 Haw. 211, 933 P.2d 48 (1997).

Ill.—People v. Conlan, 189 Ill. 2d 286, 244 Ill. Dec. 350, 725 N.E.2d 1237 (2000).

Iowa—Devault v. City of Council Bluffs, 671 N.W.2d 448 (Iowa 2003).

La.—State v. Hair, 784 So. 2d 1269 (La. 2001).

Minn.—State v. Grube, 531 N.W.2d 484 (Minn. 1995).

Neb.—State v. Connely, 243 Neb. 319, 499 N.W.2d 65 (1993).

Nev.—In re T.R., 119 Nev. 646, 80 P.3d 1276 (2003).

N.Y.—People v. Shack, 86 N.Y.2d 529, 634 N.Y.S.2d 660, 658 N.E.2d 706 (1995).

Ohio—State v. Williams, 88 Ohio St. 3d 513, 2000-Ohio-428, 728 N.E.2d 342 (2000).

Or.—State v. Chakerian, 325 Or. 370, 938 P.2d 756 (1997).

S.C.—State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004).

Utah—State v. Green, 2004 UT 76, 99 P.3d 820 (Utah 2004).

Va.—Com. v. Hicks, 267 Va. 573, 596 S.E.2d 74 (2004).

Wash.—State v. Lee, 135 Wash. 2d 369, 957 P.2d 741 (1998).

W. Va.—State ex rel. Appleby v. Recht, 213 W. Va. 503, 583 S.E.2d 800 (2002).

7 U.S.—U.S. v. Greenpeace, Inc., 314 F. Supp. 2d 1252 (S.D. Fla. 2004).

Ariz.—Soto v. Superior Court In and For County of Maricopa (State ex rel. Romley), 190 Ariz. 450, 949 P.2d 539 (Ct. App. Div. 1 1997).

Ga.—Greater Atlanta Homebuilders Ass'n v. DeKalb County, 277 Ga. 295, 588 S.E.2d 694 (2003).

As to the overbreadth doctrine, allowing third persons to challenge restrictions on the First Amendment rights of others, see § 169.

8 Neb.—State v. Green, 287 Neb. 212, 842 N.W.2d 74 (2014).

As to facial and "as applied" challenges, generally, see § 163.

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§ 166. Exceptions to prohibition against asserting rights of third parties, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 687, 727

Under certain conditions, the rights of third persons may be asserted by one who challenges the constitutionality of legislation or other governmental action.

When the plaintiff is not the object of the government action or inaction he or she challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.[1] Application of the constitutional standing requirement is not a mechanical exercise.[2] Limitations on third-party standing that restrict facial challenges to a statute's constitutionality are prudential, not jurisdictional; courts are therefore permitted to recognize such standing and allow facial challenges in some cases.[3] The rule that a person may not question the constitutionality of a statute or governmental action as it applies to others is subject to exceptions,[4] and the court may allow representation of the rights of others where there is a need to protect their rights[5] or where the case presents issues of great public importance.[6]

Concern that rights are most effectively asserted by those owning them is sufficiently eased to allow surrogate standing where there are circumstantial assurances of a litigant's effective advocacy of third-party rights.[7] Such assurances are provided where the relationship between a state-enforced measure, injury to the litigant, and the purpose or effect of the measure challenged naturally compels the litigant to fully and aggressively assert third persons' constitutional claims.[8]

Privacy interests of third party.

A litigant may assert the privacy interests of a third party when the third party, in attempting to vindicate his or her rights, would forfeit the very privacy he or she sought to protect, and the interests of the litigants are adverse.[9] A state agency may assert the privacy interests of others, including its employees[10] and corporations.[11] Certain businesses, such as an adult bookstore, may have standing to assert the privacy rights of its customers.[12] A civil litigant who obtained a favorable judgment may assert the privacy interests of jurors who are to be the subjects of a court-ordered jury interview.[13] A financial institution, as custodian of relevant documents, has standing to assert the privacy interests of its customers in the identifying information they provide.[14] An online digital newsletter has standing to assert an anonymous commenter's right to privacy in connection with a subpoena seeking to compel disclosure of the commenter's identity.[15]

First Amendment

An exception exists to the general rule that a person to whom a statute may be constitutionally applied may not base a challenge to the constitutionality of a statute as applied to others for First Amendment challenges, under which litigants are permitted to challenge a statute not because their own rights of free expression are violated but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.[16]

CUMULATIVE SUPPLEMENT

Cases:

Ordinarily, a party must assert his own legal rights and cannot rest his claim to relief on the legal rights of third parties, but an exception is recognized where the party asserting the right has a close relationship with the person who possesses the right and there is a hindrance to the possessor's ability to protect his own interests. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

A close relationship between a litigant and third party, as required for litigant to sue to protect constitutional rights of third party, ensures that the plaintiff will effectively advocate for the third party's rights. Moody v. Michigan Gaming Control Board, 847 F.3d 399 (6th Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Chamber of Commerce of U.S. v. E.P.A., 642 F.3d 192 (D.C. Cir. 2011).

2 U.S.—Pennell v. City of San Jose, 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988).

3 U.S.—Dickerson v. Napolitano, 604 F.3d 732 (2d Cir. 2010).

4 U.S.—Tobacco Road v. City of Novi, 490 F. Supp. 537 (E.D. Mich. 1979).

Haw.—Freitas v. Administrative Director of Courts, 104 Haw. 483, 92 P.3d 993 (2004).

5 Alaska—Falcon v. Alaska Public Offices Commission, 570 P.2d 469 (Alaska 1977).
Ariz.—State v. B Bar Enterprises, Inc., 133 Ariz. 99, 649 P.2d 978 (1982).
D.C.—Bell & Howell Co. v. N. L. R. B., 598 F.2d 136 (D.C. Cir. 1979).

6 N.M.—Baca v. New Mexico Dept. of Public Safety, 2002-NMSC-017, 132 N.M. 282, 47 P.3d 441 (2002).
Ohio—Ohio Roundtable v. Taft, 119 Ohio Misc. 2d 49, 2002-Ohio-3669, 773 N.E.2d 1113, 168 Ed. Law Rep. 456 (C.P. 2002).
Utah—State v. Ansari, 2004 UT App 326, 100 P.3d 231 (Utah Ct. App. 2004).

7 U.S.—Nicholson v. Board of Educ. Torrance Unified School Dist., 682 F.2d 858, 5 Ed. Law Rep. 733 (9th Cir. 1982).
Ark.—Cox v. Stayton, 273 Ark. 298, 619 S.W.2d 617 (1981).

8 U.S.—Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981).

9 Alaska—Alaska Wildlife Alliance v. Rue, 948 P.2d 976 (Alaska 1997).

10 Alaska—Alaska Wildlife Alliance v. Rue, 948 P.2d 976 (Alaska 1997).
Tex.—Industrial Foundation of the South v. Texas Indus. Acc. Bd., 540 S.W.2d 668 (Tex. 1976).

11 Mont.—Montana Health Care Ass'n v. Montana Bd. of Directors of State Compensation Mut. Ins. Fund, 256 Mont. 146, 845 P.2d 113 (1993).

12 U.S.—Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988), certified question answered, 236 Va. 168, 372 S.E.2d 618 (1988).
Haw.—State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988).
Kan.—State v. Hughes, 246 Kan. 607, 792 P.2d 1023 (1990).
La.—State v. Brenan, 772 So. 2d 64 (La. 2000).

13 Fla.—Pesci v. Maistrellis, 672 So. 2d 583 (Fla. 2d DCA 1996).

14 Cal.—Overstock.Com, Inc. v. Goldman Sachs Group, Inc., 231 Cal. App. 4th 471, 180 Cal. Rptr. 3d 234 (1st Dist. 2014).

15 Cal.—Digital Music News LLC v. Superior Court, 226 Cal. App. 4th 216, 171 Cal. Rptr. 3d 799 (2d Dist. 2014).

16 Mo.—State v. Vaughn, 366 S.W.3d 513 (Mo. 2012).
As to third-party standing with respect to overbreadth challenges, see § 169.

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§ 167. Jus tertii doctrine

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 687, 727

The "jus tertii" doctrine provides standing to a litigant who argues that a single application of a statute injures him or her and impinges on the constitutional rights of a third person.

There is a narrow exception to the rule that constitutional rights are personal rights and may not be raised by a third party for cases in which the issue would not otherwise be susceptible of judicial review, and it appears that the third party is sufficiently interested in the outcome that the interest of the party whose constitutional rights were allegedly deprived would be adequately represented.[1] The "jus tertii" doctrine provides standing to a litigant who argues that a single application of a statute injures him or her and impinges on the constitutional rights of a third person.[2] The application of the doctrine generally depends on the presence of some substantial relationship between the claimant and the third party,[3] the third party's inability otherwise to assert or effectively preserve his or her rights,[4] and the need to avoid dilution of those rights that would otherwise result.[5] The claimant must demonstrate that he or she has suffered a concrete, redressable injury[6] and that he or she is very nearly as effective a proponent of the right as the third person would be.[7] For instance, parents may exercise constitutional rights on behalf of their

children,[8] a political candidate has standing to raise the constitutional rights of voters,[9] representatives of the news media have standing to contest a court order restricting public access to legal proceedings,[10] and the guardian of an incompetent person has standing to invoke and vicariously assert the incompetent ward's constitutional right to accept or refuse medical care.[11] A physician may have standing to litigate the constitutional rights of his or her patient despite the prudential rule that a litigant may assert only the litigant's own constitutional rights or immunities.[12] The doctrine also applies where the rights of the third party would be diluted and adversely affected if the constitutional challenge brought by a litigant on his or her behalf should fail and the statute remain in force.[13]

Footnotes

1 Ark.—Arnold v. State, 2011 Ark. 395, 384 S.W.3d 488 (2011).

2 Mich.—People v. Rocha, 110 Mich. App. 1, 312 N.W.2d 657 (1981).

Corporate president and corporation

U.S.—Athens Lumber Co., Inc. v. Federal Election Com'n, 689 F.2d 1006 (11th Cir. 1982), on reh'g, 718 F.2d 363 (11th Cir. 1983).

3 U.S.—Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); Connection Distributing Co. v. Reno, 154 F.3d 281, 1998 FED App. 0249P (6th Cir. 1998).

Ariz.—State v. B Bar Enterprises, Inc., 133 Ariz. 99, 649 P.2d 978 (1982).

Fla.—Alterra Healthcare Corp. v. Estate of Shelley, 827 So. 2d 936 (Fla. 2002).

Mich.—People v. Rocha, 110 Mich. App. 1, 312 N.W.2d 657 (1981).

N.Y.—People v. Gary M., 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (Sup 1988).

Ohio—State ex rel. Pizza v. Tom S. A. Inc., 68 Ohio Misc. 19, 22 Ohio Op. 3d 309, 428 N.E.2d 878 (C.P. 1981).

Close relationship

Ga.—Feminist Women's Health Center v. Burgess, 282 Ga. 433, 651 S.E.2d 36 (2007).

W. Va.—Kanawha County Public Library Bd. v. Board of Educ. of County of Kanawha, 231 W. Va. 386, 745 S.E.2d 424, 295 Ed. Law Rep. 340 (2013).

Inextricably bound up

The general rule that a person may not assert the constitutional rights of others does not apply where the relationship between the litigant and the third person is such that enjoyment of the third person's rights is inextricably bound up with the activity the litigant wishes to address.

Md.—In re Lee, 132 Md. App. 696, 754 A.2d 426 (2000).

Importers and purchasers

Importers had third-party standing to claim that footwear tariff rates violated equal protection because they had been based on the age and gender of intended users since there was a close relationship between the importers and purchasers to extent that they sold those goods to consumers, the requirement to pay higher tariffs injured the importers, and the purchasers did not have any remedy to challenge the tariff classification.

U.S.—Rack Room Shoes v. U.S., 718 F.3d 1370 (Fed. Cir. 2013), cert. denied, 134 S. Ct. 2287, 189 L. Ed. 2d 172 (2014) and cert. denied, 134 S. Ct. 2289, 189 L. Ed. 2d 172 (2014).

4 U.S.—Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); Connection Distributing Co. v. Reno, 154 F.3d 281, 1998 FED App. 0249P (6th Cir. 1998).

Fla.—Alterra Healthcare Corp. v. Estate of Shelley, 827 So. 2d 936 (Fla. 2002).

Iowa—State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002).

Mo.—State v. Mahan, 971 S.W.2d 307 (Mo. 1998).

N.Y.—People v. Gary M., 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (Sup 1988).

N.D.—City of Fargo v. Stensland, 492 N.W.2d 591 (N.D. 1992).

Hindrance to the third party's ability to protect his or her own interests

Ga.—Feminist Women's Health Center v. Burgess, 282 Ga. 433, 651 S.E.2d 36 (2007).

W. Va.—Kanawha County Public Library Bd. v. Board of Educ. of County of Kanawha, 231 W. Va. 386, 745 S.E.2d 424, 295 Ed. Law Rep. 340 (2013).

5 Ariz.—State v. B Bar Enterprises, Inc., 133 Ariz. 99, 649 P.2d 978 (1982).
Md.—In re Lee, 132 Md. App. 696, 754 A.2d 426 (2000).
Mich.—People v. Rocha, 110 Mich. App. 1, 312 N.W.2d 657 (1981).

6 U.S.—Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); Connection Distributing Co. v. Reno, 154 F.3d 281, 1998 FED App. 0249P (6th Cir. 1998).
Fla.—Alterra Healthcare Corp. v. Estate of Shelley, 827 So. 2d 936 (Fla. 2002).
Injury in fact
Ga.—Feminist Women's Health Center v. Burgess, 282 Ga. 433, 651 S.E.2d 36 (2007).
W. Va.—Kanawha County Public Library Bd. v. Board of Educ. of County of Kanawha, 231 W. Va. 386, 745 S.E.2d 424, 295 Ed. Law Rep. 340 (2013).
Personal injury or stake
Standing to bring actions on behalf of third parties to challenge the constitutionality of a statute requires the litigant to establish a personal injury or stake in the application of the challenged statute.
Iowa—Godfrey v. State, 752 N.W.2d 413 (Iowa 2008).

7 Md.—In re Lee, 132 Md. App. 696, 754 A.2d 426 (2000).
N.D.—City of Fargo v. Stensland, 492 N.W.2d 591 (N.D. 1992).

8 U.S.—Callahan v. Woods, 658 F.2d 679 (9th Cir. 1981).
N.J.—Matter of Quinlan, 70 N.J. 10, 355 A.2d 647, 79 A.L.R.3d 205 (1976).
Establishment Clause rights
U.S.—Doe v. Porter, 370 F.3d 558, 188 Ed. Law Rep. 100, 58 Fed. R. Serv. 3d 901, 2004 FED App. 0171P (6th Cir. 2004).
Alaska—Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979).
Noncustodial parent
The father of an elementary school student lacked prudential standing to bring an action in federal court challenging the constitutionality of the school district's policy requiring a teacher-led recitation of the Pledge of Allegiance; a state court had enjoined the father from including his daughter as an unnamed party or suing as the daughter's next friend, and the mother, who possessed final authority over decisions concerning the health, education, and welfare of her daughter, had no objection to the daughter either reciting or hearing others recite the Pledge of Allegiance and believed the daughter would be harmed if the litigation were permitted to proceed.
U.S.—Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301, 159 L. Ed. 2d 98, 188 Ed. Law Rep. 17 (2004) (abrogated on other grounds by, Lexmark Intern., Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)).

9 U.S.—Walgren v. Board of Selectmen of Town of Amherst, 519 F.2d 1364 (1st Cir. 1975).
Me.—Pembroke School Committee v. Veader, 2002 ME 161, 809 A.2d 624, 171 Ed. Law Rep. 864 (Me. 2002).
Nev.—Tam v. Colton, 94 Nev. 453, 581 P.2d 447 (1978).

10 Miss.—Gannett River States Pub. Co. v. Hand, 571 So. 2d 941 (Miss. 1990).

11 Del.—Matter of Tavel, 661 A.2d 1061 (Del. 1995).

12 Mont.—Williamson v. Montana Public Service Com'n, 2012 MT 32, 364 Mont. 128, 272 P.3d 71 (2012).
Abortion provider
An abortion provider failed to establish standing to assert the privacy rights of parents of unemancipated minor patients in its constitutional challenge to a statutory provision requiring that a physician performing an abortion on a pregnant unemancipated minor secure the written and notarized consent from one of the minor's parents; the provider failed to demonstrate a substantial relationship with the parents or that the parents could not assert their rights on their own behalf, and the provider and the parents did not have a unified interest in the outcome of a challenge that would seem to weaken a provision that in many cases would protect the parents' fundamental right to control the upbringing of their children.
Ariz.—Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Gynecologists, 227 Ariz. 262, 257 P.3d 181 (Ct. App. Div. 1 2011).

13 U.S.—Carey v. Population Services, Intern., 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977).
N.J.—Trombetta v. Mayor and Com'rs of City of Atlantic City, 181 N.J. Super. 203, 436 A.2d 1349 (Law Div. 1981), judgment aff'd, 187 N.J. Super. 351, 454 A.2d 900 (App. Div. 1982).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

2. Assertion of Rights of Third Parties

b. Exceptions to Prohibition

§ 168. Representation of third parties by corporations, associations, and labor unions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 687, 727

A corporation, association, or labor union has standing to assert a constitutional challenge on its own behalf, and an association or labor union may also do so on behalf of its members.

A corporation,[1] an association,[2] or a labor union[3] has standing to assert a constitutional challenge on its own behalf, and an association or labor union may also do so on behalf of its members[4] unless the organization fails to show any harm to any of its members that could be attributed to the challenged action.[5] However, a corporation cannot assert the invalidity of a statutory penalty imposed on an officer for refusing to waive the privilege against self-incrimination.[6]

CUMULATIVE SUPPLEMENT

Cases:

Association representing Kansas public school teachers adequately alleged individual-member standing, as required for association to have standing to maintain action challenging constitutionality of bill amending Teacher Due Process Act to remove statutory protections regarding termination or nonrenewal of certain public school teachers' employment contracts; cognizable injury could be inferred from allegation that association's members lost "valuable rights" as a result of the amendment, and it was not necessary to wait until a school district took action against a teacher's contract because it could also be inferred that at least one member's employment was controlled by the statutes rather than a negotiated agreement with a school district. Kan. Stat. Ann. § 72-5436 et seq. Kansas National Education Association v. State, 387 P.3d 795 (Kan. 2017).

[END OF SUPPLEMENT]

Footnotes

1 Ga.—Caldwell v. Hospital Authority of Charlton County, 248 Ga. 887, 287 S.E.2d 15 (1982).
Ill.—Buettell v. Walker, 59 Ill. 2d 146, 319 N.E.2d 502 (1974).
Church
U.S.—Church of Scientology of California v. Cazares, 638 F.2d 1272 (5th Cir. 1981).
Foreign corporation
U.S.—Franchise Tax Bd. of California v. Alcan Aluminium Ltd., 493 U.S. 331, 110 S. Ct. 661, 107 L. Ed. 2d 696 (1990).
Corporate comptroller
A corporation's comptroller had no practical obstacles that prevented him from asserting his First Amendment retaliation claim against a city and its former mayor, arising out of the city's revocation of a liquor license in a bar owned by the corporation, such that the corporation could assert third-party standing on the comptroller's behalf; the comptroller had brought his own claim before the district court, persisting in the claim throughout a second trial until such time as the district court rejected his claim upon determination that he had not suffered an actionable constitutional violation.
U.S.—Hodak v. City of St. Peters, 535 F.3d 899 (8th Cir. 2008).
Personal financial information of third parties
A corporation was not entitled to certiorari relief from an order compelling production of pre-class certification discovery on the ground that the discovery disclosed personal financial information of third parties entitled to constitutional privacy protection; the corporation lacked standing to assert the privacy rights of the third parties, and the trial court entered a confidentiality order as to the documents produced.
Fla.—Homeward Residential, Inc. v. Rico, 110 So. 3d 470 (Fla. 4th DCA 2013).

2 U.S.—National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).
D.C.—Iowa Independent Bankers v. Board of Governors of Federal Reserve System, 511 F.2d 1288 (D.C. Cir. 1975).
Ill.—Illinois Gamefowl Breeders Ass'n v. Block, 75 Ill. 2d 443, 27 Ill. Dec. 465, 389 N.E.2d 529 (1979).
Pa.—Delaware Valley Apartment House Owner's Ass'n v. Com., Dept. of Revenue, 36 Pa. Commw. 615, 389 A.2d 234 (1978).
Political party
U.S.—Socialist Workers Party v. Hardy, 480 F. Supp. 941 (E.D. La. 1977), aff'd, 607 F.2d 704 (5th Cir. 1979).
Nonprofit organization
A nonprofit organization that sought to improve the working conditions of taxicab drivers had standing to bring a civil rights action on its own behalf against a municipality, municipal officials, and others, alleging that the municipality's policy of suspending drivers' taxicab licenses upon notification of arrest, without hearing, violated the federal constitution, state law, and municipal law, where the organization allocated resources to assist drivers only when another party had initiated proceedings against one of its members, and it would have secured a permanent benefit for itself if the suit proved successful by avoiding the need for further lawsuits on similar claims.
N.Y.—Nnebe v. Daus, 644 F.3d 147 (2d Cir. 2011).

3 U.S.—Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979).

Privacy rights

Labor unions representing postal employees had associational standing to bring a claim that the Postal Service violated employees' constitutional right to privacy by adopting a policy and practice of obtaining and disclosing the employees' protected health information without their knowledge or consent, where the type of record in each case was medical, the information was protected health information, the potential harm was to the patient and to the relationship between the patient and his or her health care provider, and safeguards, the need for access, and the policy basis were found in statutes and regulations.

U.S.—National Ass'n of Letter Carriers, AFL-CIO v. U.S. Postal Service, 604 F. Supp. 2d 665 (S.D. N.Y. 2009).

4 U.S.—Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986); Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977).

Mont.—Montana Environmental Information Center v. Department of Environmental Quality, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (1999).

Tex.—Texas Workers' Compensation Com'n v. Garcia, 893 S.W.2d 504 (Tex. 1995).

Nonprofit organization

A nonprofit organization had standing to bring a § 1983 Establishment Clause action seeking to enjoin a public school from allowing Bible classes to be taught where the parents of two of the students in the school were members of the organization, and one of the organization's central purposes was to challenge practices that violate the separation of church and state.

U.S.—Doe v. Porter, 370 F.3d 558, 188 Ed. Law Rep. 100, 58 Fed. R. Serv. 3d 901, 2004 FED App. 0171P (6th Cir. 2004).

Members' standing

To possess associational standing, an association must establish that its members would otherwise have standing to sue in their own right.

Mass.—Animal Legal Defense Fund, Inc. v. Fisheries & Wildlife Bd., 416 Mass. 635, 624 N.E.2d 556 (1993).

5 N.Y.—Rudder v. Pataki, 93 N.Y.2d 273, 689 N.Y.S.2d 701, 711 N.E.2d 978 (1999).

6 U.S.—George Campbell Painting Corp. v. Reid, 392 U.S. 286, 88 S. Ct. 1978, 20 L. Ed. 2d 1094 (1968).

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16 C.J.S. Constitutional Law § 169

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

2. Assertion of Rights of Third Parties

b. Exceptions to Prohibition

§ 169. Overbreadth doctrine

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 765

The overbreadth doctrine authorizes a litigant to assert the facial unconstitutionality of a statute involving a First Amendment freedom which creates a chilling effect on the freedom of expression.

Litigants need not meet the traditional requirement of standing when challenging the constitutionality of a statute on the grounds of overbreadth.[1] Overbreadth is an exception to traditional rules of standing that permit litigants to assert their own rights but not the rights of others.[2] The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others.[3] The overbreadth doctrine allows a court to consider a statute's effect on third parties regardless of its effect on the individual challenging the statute.[4] The overbreadth doctrine allows a plaintiff to mount a facial challenge to a statute even if the statute, as applied to that plaintiff, is constitutional; in other words, it enables a plaintiff to challenge a statute based on how it impacts the rights of parties not before the court.[5] Under the overbreadth doctrine, a plaintiff whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also

threatens others not before the court, those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.[6] A party has standing to raise a facial overbreadth challenge to a statute and may prevail on that claim if he or she can establish that the statute reaches a substantial amount of constitutionally protected conduct even though the party personally did not engage in such conduct.[7] Even though the person against whom an overbroad statute is enforced always has the right to mount an as applied constitutional challenge, the overbreadth doctrine allows facial challenges against the statute on the ground that a person affected by the statute may be reluctant to assert his or her free speech rights due to the cost of litigation and the potential for enforcement sanctions.[8] Litigants asserting facial challenges involving overbreadth under the First Amendment have standing where their own rights of free expression are not violated because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.[9] Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.[10] Such challenges are allowed not primarily for the benefit of the litigant but also for the benefit of society[11] and because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.[12]

The First Amendment overbreadth doctrine speaks to whose interests a plaintiff suffering Article III injury may represent; it does not provide a reason to find such injury where none is present or imminently threatened in the first instance.[13] Also, allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.[14]

When a plaintiff challenges the constitutionality of a statute based on assertion of a First Amendment right, the plaintiff is allowed to challenge a law that may be legitimately applied to his or her own expressive conduct if the law has the potential to infringe unconstitutionally on the expressive conduct of others.[15] Thus, a person may challenge a statute as overly broad even though his or her own conduct is not constitutionally protected, or he or she was not engaged in privileged conduct,[16] and even though the statute could be constitutionally applied to his or her activities[17] if it were more narrowly drawn and specific.[18]

The overbreadth doctrine is not casually employed, so as to permit an attack on an overly broad statute with no requirement that the person making the attack demonstrate that his or her own conduct could not be regulated by the statute drawn with requisite narrow specificity, simply because the challenge is based on the First Amendment,[19] and the doctrine should be applied sparingly and as a last resort.[20] The overbreadth and the deterrent effect of the challenged statute must be substantial,[21] particularly where conduct is involved,[22] and the challenged statute must pose a realistic danger of significantly compromising the recognized First Amendment rights of persons not before the court.[23]

The overbreadth doctrine applies weakly, if at all, in the ordinary commercial context,[24] and a party challenging the constitutionality of a restriction on commercial speech must normally demonstrate his or her standing by first showing that his or her particular conduct is protected under the First Amendment.[25] In any event, the doctrine is inapplicable in the absence of the regulation of a First Amendment freedom[26] and is inapplicable to the right of privacy.[27] Unless the challenged statute proscribes acts which overlap constitutionally protected conduct, a person does not have standing to challenge a statute as overbroad where his or her conduct is clearly illegal and proscribed in understandable terms.[28] Thus, a person to whom a statute properly applies cannot obtain relief on an overbreadth claim based on arguments that a differently situated person might present.[29] Furthermore, standing to raise the issue of facial overbreadth will not be granted to a litigant against whom a statute is applied if there is presently an alternative litigant who is challenging the facial overbreadth of the statute and against whom the statute is not applied.[30]

When overbreadth has only due process implications, a person has no standing to make facial attack but only has standing to challenge the statute as applied to his or her own conduct.[31]

Whereas the absence of First Amendment concerns renders an overbreadth claim nonjusticiable under notions of prudential third-party standing, a vagueness claim not implicating the First Amendment remains cognizable but only as applied to the facts of the case presented.[32]

CUMULATIVE SUPPLEMENT

Cases:

Generally, the injury-in-fact requirement for Article III standing means that litigants will have standing to challenge government action only when it restricts their own constitutionally protected activities, but an exception to this general principle exists for First Amendment free speech challenges alleging that a statute or regulation is overbroad. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1. Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019).

When considering a claim that a statute is overbroad or facially invalid, a federal court may relax certain prudential standing doctrines because of the potential for an unconstitutionally overbroad law to chill protected speech; but this exception applies only to prudential standing doctrines, such as the prohibition on third-party standing, and not to those mandated by Article III, such as the injury-in-fact requirement. U.S. Const. art. 3, § 2, cl. 1.; U.S. Const. Amend. 1. Phillips v. DeWine, 841 F.3d 405 (6th Cir. 2016).

In-home care providers lacked standing to pursue claim alleging that ballot initiative, which amended Washington's Public Records Act (PRA) by prohibiting public access to in-home care providers' personal information, but permitting that information to be disclosed to providers' certified exclusive bargaining representatives, violated the First Amendment by denying other in-home care providers the right to receive union information from providers, since providers did not assert their own legal rights, but those of third parties. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; Wash. Rev. Code Ann. §§ 42.56.640, 43.17.410. Boardman v. Inslee, 978 F.3d 1092 (9th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Fla.—State v. Catalano, 104 So. 3d 1069 (Fla. 2012).

2 Mass.—Schoeller v. Board of Registration of Funeral Directors and Embalmers, 463 Mass. 605, 977 N.E.2d 524 (2012).

3 U.S.—Massachusetts v. Oakes, 491 U.S. 576, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989).
Ill.—People v. Melongo, 2014 IL 114852, 379 Ill. Dec. 43, 6 N.E.3d 120 (Ill. 2014).
Kan.—State v. Williams, 299 Kan. 911, 329 P.3d 400, 101 A.L.R.6th 663 (2014).
Ky.—Martin v. Com., 96 S.W.3d 38 (Ky. 2003).
La.—State v. Smith, 144 So. 3d 867 (La. 2014).
Mich.—In re Chmura, 461 Mich. 517, 608 N.W.2d 31 (2000).
Mo.—State v. Moore, 90 S.W.3d 64 (Mo. 2002).
Neb.—State v. Hookstra, 263 Neb. 116, 638 N.W.2d 829 (2002).
S.D.—State v. Martin, 2003 SD 153, 674 N.W.2d 291 (S.D. 2003).
Tex.—Texas Workers' Compensation Com'n v. Garcia, 893 S.W.2d 504 (Tex. 1995).
Utah—Provo City Corp. v. Thompson, 2004 UT 14, 86 P.3d 735 (Utah 2004).

Wyo.—Kenyon v. State, 2004 WY 100, 96 P.3d 1016 (Wyo. 2004).

Substantially overbroad

An overbreadth challenge to a statute can be raised on behalf of others only when the statute is substantially overbroad, i.e., when it is unconstitutional in a substantial portion of cases to which it applies.

U.S.—Regan v. Time, Inc., 468 U.S. 641, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984).

4 S.D.—State v. Stark, 2011 SD 46, 802 N.W.2d 165 (S.D. 2011).

5 Utah—Bushco v. Utah State Tax Com'n, 2009 UT 73, 225 P.3d 153 (Utah 2009).

6 U.S.—Legend Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011).

7 Conn.—State v. Cook, 287 Conn. 237, 947 A.2d 307 (2008).

8 Utah—Bushco v. Utah State Tax Com'n, 2009 UT 73, 225 P.3d 153 (Utah 2009).

9 U.S.—McCauley v. University of the Virgin Islands, 54 V.I. 849, 618 F.3d 232, 260 Ed. Law Rep. 551 (3d Cir. 2010); Glenn v. Holder, 690 F.3d 417, 77 A.L.R. Fed. 2d 605 (6th Cir. 2012), cert. denied, 133 S. Ct. 1581, 185 L. Ed. 2d 576 (2013).

10 U.S.—Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984).

11 U.S.—Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999).

12 U.S.—Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980).

Iowa—State v. Williams, 238 N.W.2d 302 (Iowa 1976).

Minn.—State by Spannaus v. Century Camera, Inc., 309 N.W.2d 735, 23 A.L.R.4th 171 (Minn. 1981).

Wis.—State v. Johnson, 108 Wis. 2d 703, 324 N.W.2d 447 (Ct. App. 1982).

13 U.S.—Hedges v. Obama, 724 F.3d 170 (2d Cir. 2013), cert. denied, 134 S. Ct. 1936, 188 L. Ed. 2d 960 (2014).

14 U.S.—Savage v. Gee, 665 F.3d 732, 275 Ed. Law Rep. 570 (6th Cir. 2012).

15 U.S.—Dickerson v. Napolitano, 604 F.3d 732 (2d Cir. 2010).

16 U.S.—Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

Idaho—State v. Goodrick, 102 Idaho 811, 641 P.2d 998 (1982).

N.D.—State v. Woodworth, 234 N.W.2d 243 (N.D. 1975).

S.D.—State v. Asmussen, 2003 SD 102, 668 N.W.2d 725 (S.D. 2003).

17 U.S.—Alexander v. U.S., 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993).

Iowa—State v. Milner, 571 N.W.2d 7 (Iowa 1997).

La.—State v. Franzone, 384 So. 2d 409 (La. 1980).

Neb.—State v. Kipf, 234 Neb. 227, 450 N.W.2d 397 (1990).

Utah—Provo City Corp. v. Thompson, 2004 UT 14, 86 P.3d 735 (Utah 2004).

18 U.S.—Alexander v. U.S., 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993).

Fla.—State v. Brake, 796 So. 2d 522 (Fla. 2001).

Idaho—State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).

19 U.S.—Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999).

20 Utah—Provo City Corp. v. Thompson, 2004 UT 14, 86 P.3d 735 (Utah 2004).

21 U.S.—Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29 (1992).

La.—State ex rel. RT, 781 So. 2d 1239 (La. 2001).

Neb.—State v. Carpenter, 250 Neb. 427, 551 N.W.2d 518 (1996).

22 U.S.—Tollett v. U.S., 485 F.2d 1087 (8th Cir. 1973).

23 Idaho—State v. Casey, 125 Idaho 856, 876 P.2d 138 (1994).

Mont.—State v. Martel, 273 Mont. 143, 902 P.2d 14 (1995).

24 U.S.—Record Head Corp. v. Sachen, 682 F.2d 672 (7th Cir. 1982).

Iowa—MRM, Inc. v. City of Davenport, 290 N.W.2d 338 (Iowa 1980).

25 Ill.—Vuagniaux v. Department of Professional Regulation, 208 Ill. 2d 173, 280 Ill. Dec. 635, 802 N.E.2d 1156 (2003).

26 U.S.—U.S. v. Boffa, 513 F. Supp. 444, 7 Fed. R. Evid. Serv. 1734 (D. Del. 1980).

Alaska—Smith v. State, Dept. of Corrections, 872 P.2d 1218 (Alaska 1994).

Ariz.—State v. Carruth, 132 Ariz. 368, 645 P.2d 1282 (Ct. App. Div. 2 1982).

27 Ariz.—State v. B Bar Enterprises, Inc., 133 Ariz. 99, 649 P.2d 978 (1982).
Ill.—People v. Garrison, 82 Ill. 2d 444, 45 Ill. Dec. 132, 412 N.E.2d 483 (1980).

28 U.S.—U.S. v. Shiel, 611 F.2d 526 (4th Cir. 1979); U.S. v. Varkonyi, 645 F.2d 453 (5th Cir. 1981).
Fla.—Carlson v. State, 405 So. 2d 173 (Fla. 1981).

29 U.S.—U.S. v. Skoien, 614 F.3d 638 (7th Cir. 2010).

30 U.S.—Wilson v. Swing, 463 F. Supp. 555 (M.D. N.C. 1978); McNea v. Garey, 434 F. Supp. 95 (N.D. Ohio 1976).

31 Va.—Stanley v. City of Norfolk, 218 Va. 504, 237 S.E.2d 799 (1977).

32 D.C.—McNeely v. U.S., 874 A.2d 371 (D.C. 2005).

As to third-party standing with respect to challenges for vagueness, see § 165.

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16 C.J.S. Constitutional Law § 170

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Constitutional Law
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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

3. Standing of Particular Types of Persons

a. In General

§ 170. Voters; citizens

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 681, 685

A voter or citizen generally may not challenge the constitutionality of governmental action that does not infringe on his or her property or personal rights.

Generally, the fact that a person is a voter does not entitle him or her to challenge the constitutionality of a statute or governmental action which does not affect his or her property or personal rights[1] or affect him or her in a manner distinguishable from its effect on other voters.[2] A voter who is also a citizen and taxpayer, however, may question the validity of a statute infringing on his or her constitutional rights.[3]

In order to sustain standing as such, a citizen must show that he or she has sustained, or is immediately in danger of sustaining, a direct injury as a result of an unconstitutional statute or governmental action[4] or that his or her personal or property rights,[5] or his or her political rights,[6] are affected by the operation of the statute. A citizen who does not profess to sue on behalf of

others and who has no interest in the validity of a law beyond that of other citizens or the public in general may not raise the question of the constitutionality of a statute or governmental action.[7]

CUMULATIVE SUPPLEMENT

Cases:

Assuming that Republican member of Congress from Virginia had Article III standing when he initially intervened to defend congressional redistricting plan enacted by Virginia legislature, in voters' action alleging that a district in the plan, which district was not represented by member, was an unconstitutional racial gerrymander, member lacked Article III standing at time of direct appeal to Supreme Court from three-judge district court's decision striking down the plan, because a favorable decision reinstating enacted plan would not likely redress alleged injury to member, and thus, member's appeal would be dismissed; while member's brief to Supreme Court asserted that replacement plan's threat of increase in number of Democratic voters in district he was representing compelled him to run in another district, after Supreme Court oral argument his counsel notified Court that member would continue to seek election in other district regardless of whether Court reinstated enacted plan. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1253. Wittman v. Personhuballah, 136 S. Ct. 1732 (2016).

Assuming that two Republican members of Congress from Virginia alleged a legally cognizable injury by asserting that unless the congressional redistricting plan enacted by Virginia legislature, which three-judge district court found to be unconstitutional racial gerrymander for a congressional district that neither member represented, was reinstated, their chance of reelection would be reduced because their districts would have more Democratic voters under replacement plan, members, in their direct appeal to Supreme Court from decision of three-judge district court, pointed to no evidence in support of such injury, for purposes of injury element for Article III standing to maintain the appeal, and thus, their appeal would be dismissed. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1253. Wittman v. Personhuballah, 136 S. Ct. 1732 (2016).

Although lesbian, gay, bisexual, transgender (LGBT), and unmarried persons who challenged a state statute as unconstitutional under the Establishment Clause claimed that their stigmatic injury was analogous to the injury-in-fact that provided standing in religious-display cases, they made no clear showing of a personal confrontation, as required to support standing; plaintiffs could not personally confront "statutory text" that prohibited discrimination against citizens holding religious beliefs reflecting disapproval of LGBT and unmarried persons, and allowing standing on that basis would be indistinguishable from allowing standing based on a generalized interest of all citizens in the government's complying with the Establishment Clause without an injury-in-fact. U.S. Const. Art. 3, § 2, cl. 1; U.S. Const. Amend. 1. Barber v. Bryant, 2017 WL 2702075 (5th Cir. 2017).

Leaders of non-theist belief communities had standing to bring claims that state house of representatives' practices of refusing to permit them to deliver opening invocations at commencement of legislative sessions and requiring visitors to rise for opening invocations violated Free Speech, Free Exercise, and Equal Protection Clauses. U.S. Const. Amends. 1, 14. Fields v. Speaker of the Pennsylvania House of Representatives, 251 F. Supp. 3d 772 (M.D. Pa. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974).
Nev.—Tam v. Colton, 94 Nev. 453, 581 P.2d 447 (1978).
Tenn.—Parks v. Alexander, 608 S.W.2d 881 (Tenn. Ct. App. 1980).
Wyo.—Lund v. Schrader, 492 P.2d 202 (Wyo. 1971).

2 U.S.—Athens Lumber Co., Inc. v. Federal Election Com'n, 689 F.2d 1006 (11th Cir. 1982), on reh'g, 718 F.2d 363 (11th Cir. 1983).
Conn.—Town of Berlin v. Santaguida, 181 Conn. 421, 435 A.2d 980 (1980).
Pa.—Kauffman v. Osser, 441 Pa. 150, 271 A.2d 236 (1970).
Tenn.—Parks v. Alexander, 608 S.W.2d 881 (Tenn. Ct. App. 1980).

3 U.S.—Harman v. Forssenius, 380 U.S. 528, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965).
La.—Regira v. Falsetta, 405 So. 2d 850 (La. Ct. App. 1st Cir. 1981), rev'd in part on other grounds, 405 So. 2d 825 (La. 1981).
Mass.—Vigneault v. Secretary of Com., 354 Mass. 362, 237 N.E.2d 286 (1968).
Mont.—Jones v. Judge, 176 Mont. 251, 577 P.2d 846 (1978).
As to taxpayer standing, see §§ 171, 172

Persons outside the United States

The two available toeholds to persons who assert constitutional rights from outside the sovereign territory of the United States are American citizenship and some element of de facto or de jure American sovereignty over the territory of the events in question.
U.S.—Veiga v. World Meteorological Organization, 568 F. Supp. 2d 367 (S.D. N.Y. 2008), judgment aff'd, 368 Fed. Appx. 189 (2d Cir. 2010).

4 U.S.—Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969).

No standing where injury speculative

Idaho—Noh v. Cenarrusa, 137 Idaho 798, 53 P.3d 1217 (2002).

State courts

Although a state court is generally more sympathetic to claim based on standing as citizen than is the federal system, the standing requirement remains a key component to maintain the state constitutional scheme of separations of powers and is a limit on the court's jurisdiction which restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury.
Ind.—Pence v. State, 652 N.E.2d 486 (Ind. 1995).

Standing alleged

(1) Individuals concerned with the operation of District of Columbia area airports had standing to challenge the constitutionality of the creation of a board consisting of members of Congress and with veto power over decisions of the local airport authority; the plaintiffs' claims that the plan approved under the statutory scheme would result in increased noise, pollution, and risk of accidents were sufficient to allege a personal injury fairly traceable to the board's veto power, and the board's veto power was an impediment to reduction in the complained-of activity.
U.S.—Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 111 S. Ct. 2298, 115 L. Ed. 2d 236 (1991).
(2) A United States citizen, who wished to use and exhibit Canadian films termed "political propaganda" under the Foreign Agents Registration Act, had standing to bring an action challenging the constitutionality of the use of the phrase "political propaganda" in the Act, though use of the phrase did not prevent the citizen from obtaining or exhibiting the films, where the citizen claimed that the use of the phrase threatened to cause him cognizable injury in that if he exhibited films bearing such characterization, his personal, political, and professional reputation would suffer, and his ability to obtain reelection and to practice his profession would be impaired; the risk of injury to the citizen's reputation could fairly be traced from the statute's use of the phrase, and enjoining application of the words "political propaganda" to the films in question, as sought by the citizen, would at least partially redress the reputational injury complained of.
U.S.—Meese v. Keene, 481 U.S. 465, 107 S. Ct. 1862, 95 L. Ed. 2d 415 (1987).

5 U.S.—Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969).
Fla.—Sandstrom v. Leader, 370 So. 2d 3 (Fla. 1979).
Ga.—Payne v. Bradford, 231 Ga. 487, 202 S.E.2d 422 (1973).
N.Y.—Abrams v. New York City Transit Authority, 48 A.D.2d 69, 368 N.Y.S.2d 165 (1st Dep't 1975), order aff'd, 39 N.Y.2d 990, 387 N.Y.S.2d 235, 355 N.E.2d 289 (1976).
N.C.—State ex rel. Summrell v. Carolina-Virginia Racing Ass'n, 239 N.C. 591, 80 S.E.2d 638 (1954).

Public right doctrine

The public right doctrine, providing that any member of the public may seek relief in the nature of mandamus to compel the performance of a duty required by law, does not apply to confer standing in the context of

a challenge to the constitutionality of a statute; the court can inquire into the general constitutionality of a statute only at the instance of a plaintiff whose liberty, rights, or property was invaded through its operation.
Mass.—Tax Equity Alliance for Massachusetts v. Commissioner of Revenue, 423 Mass. 708, 672 N.E.2d 504 (1996).

First Amendment rights

A resident had standing to bring an as-applied challenge to a town's sign ordinance as a content-based restriction of speech in violation of the First Amendment; inasmuch as the relevant content distinction derived from the town's conscious choice to exempt certain signs from regulation, the resident's legal injury derived from the exemptions no less than from the substantive restrictions themselves, and the resident was entitled to subject the exemptions to constitutional scrutiny.
U.S.—Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013).

6 U.S.—Swann v. Adams, 385 U.S. 440, 87 S. Ct. 569, 17 L. Ed. 2d 501 (1967).
D.C.—Common Cause v. Bolger, 512 F. Supp. 26 (D.D.C. 1980).
Ga.—Fortson v. Weeks, 232 Ga. 472, 208 S.E.2d 68 (1974).

Right to vote

Residents alleged facts that showed a fairly traceable causal connection between their claimed injuries and the challenged conduct of the secretary of state, the state coordinator of elections, and the attorney general so as to satisfy the causation element of constitutional standing for residents to challenge the constitutionality of the Tennessee Voter Identification Act in an action for declaratory judgment against those parties; the residents asserted that the defendants' enforcement of the act precluded them from voting without presenting one of the forms of photographic identification (ID) recognized as valid under the Act, which in turn caused various asserted infringements of their constitutional right to vote.
Tenn.—City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013).

Service on government board

Citizens of a state who did not own real property had standing to challenge, under the Equal Protection Clause, a state law requirement that one own real property to serve on a government board.
U.S.—Quinn v. Millsap, 491 U.S. 95, 109 S. Ct. 2324, 105 L. Ed. 2d 74 (1989).

Position on appellate court

An individual who had an interest in filling a state appellate judge's position did not suffer a concrete and particularized injury as a result of the method by which Tennessee appellate judges were evaluated and selected for office, and thus lacked standing to bring an action challenging the method's constitutionality, even though his application to have his name placed on the ballot as a candidate for the position had been denied, where the plaintiff did not claim that he had suffered any particularized injury or that he was treated differently from anyone else but instead asserted that he and the people of Tennessee had been or would be deprived of their First and Fourteenth Amendment rights to vote for appellate judges.
U.S.—Moncier v. Haslam, 1 F. Supp. 3d 854 (E.D. Tenn. 2014), aff'd, 570 Fed. Appx. 553 (6th Cir. 2014).

Gerrymandering

(1) Citizens who did not live in a district that was the primary focus of their racial gerrymandering claim lacked standing to bring suit.
U.S.—Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996); Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996).

(2) The residents of a challenged voting district had standing to bring an equal protection challenge to redistricting legislation which resulted in the creation of the district.
U.S.—Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995).

Right to republican form of government

A citizen of a state, and individual members of the state legislature, had standing to bring suit seeking to enjoin implementation of a remedy adopted by the state's supreme court ordering the state to recognize the marriage of same-sex couples, on the basis that, because the court's adoption of remedy violated separation-of-powers principles under the state constitution, the remedy in addition violated their rights under the provision of Federal Constitution guaranteeing every state a republican form of government.
Mass.—Largess v. Supreme Judicial Court for State of Massachusetts, 373 F.3d 219 (1st Cir. 2004).

7 U.S.—Whitmore v. Arkansas, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990).
D.C.—Halperin v. Central Intelligence Agency, 629 F.2d 144 (D.C. Cir. 1980).
Idaho—Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 15 P.3d 1129 (2000).

Ind.—Pence v. State, 652 N.E.2d 486 (Ind. 1995).
Mont.—Carter v. Montana Dept. of Transp., 274 Mont. 39, 905 P.2d 1102 (1995).
N.J.—Bonnet v. State, 141 N.J. Super. 177, 357 A.2d 772 (Law Div. 1976), judgment aff'd, 155 N.J. Super. 520, 382 A.2d 1175 (App. Div. 1978), aff'd, 78 N.J. 325, 395 A.2d 194 (1978).
N.Y.—Abrams v. New York City Transit Authority, 48 A.D.2d 69, 368 N.Y.S.2d 165 (1st Dep't 1975), order aff'd, 39 N.Y.2d 990, 387 N.Y.S.2d 235, 355 N.E.2d 289 (1976).
N.C.—Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979).
Ohio—State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St. 3d 451, 1999-Ohio-123, 715 N.E.2d 1062 (1999).

Equal Protection

Tex.—Texas Dept. of Transp. v. City of Sunset Valley, 146 S.W.3d 637 (Tex. 2004).

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Constitutional Law
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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

3. Standing of Particular Types of Persons

a. In General

§ 171. Taxpayers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 683

Where a taxpayer is injuriously affected by an allegedly unconstitutional feature of a statute, or by an unconstitutional governmental action, he or she may challenge its constitutionality.

With certain narrow exceptions, taxpayers, as such, lack generalized standing to challenge the constitutionality of governmental action.[1] A taxpayer, as a taxpayer, does not have standing to attack the constitutionality of any and all legislation.[2] As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable "personal injury" required for Article III standing.[3] Because the interests of the taxpayer are, in essence, the interests of the public-at-large, deciding a constitutional claim based solely on taxpayer standing would be not to decide a judicial controversy but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly courts do not possess.[4] However, a taxpayer injuriously affected by a statute or other governmental action may attack its validity[5] as where the failure to accord such standing would, in effect, erect an impenetrable barrier to judicial scrutiny of legislative action.[6]

To establish taxpayer standing, the plaintiff must show a logical link between the plaintiff's taxpayer status and the type of legislative enactment attacked and a nexus between the plaintiff's taxpayer status and the precise nature of the constitutional infringement alleged.[7] The use of funds for an allegedly unconstitutional program, without more, is not sufficient to meet these requirements; the appropriation of those funds for such a purpose is what provides the necessary link between taxpayer and expenditure to create standing.[8] The allegation of an incidental expenditure of tax funds in the administration of an essentially regulatory statute is also insufficient to establish taxpayer standing.[9] To support taxpayer standing to challenge an allegedly unconstitutional practice, time spent by a state employee on challenged practice must be paid, not volunteer, and must be more than de minimis.[10]

A taxpayer may attack a statute or governmental action which authorizes the expenditure of public funds,[11] or prescribes the legislative procedure for the enactment of appropriations,[12] or exempts persons or property from taxation,[13] or imposes on him or her in its enforcement an additional financial burden.[14] Thus, a taxpayer may generally have standing to challenge the constitutionality of a tax imposed by a local government.[15] Municipal taxpayers have standing to challenge unconstitutional government expenditures if their interest is direct and immediate.[16] To establish standing as a municipal taxpayer, a plaintiff must show that he or she is a municipal resident and that municipality has used or will use tax money on an unconstitutional program; taxpayer standing may be shown even where the amount expended on an unconstitutional program is minuscule.[17]

Establishment Clause challenges

Taxpayers have standing in federal courts to challenge an alleged violation of the Establishment Clause if: (1) there is a logical link between taxpayer status and the legislative enactment, and (2) there is a nexus between taxpayer status and the constitutional infringement alleged.[18] For a taxpayer to have standing to challenge a state expenditure as violating the Establishment Clause, the challenged action must be a specific enactment of the state legislature; this expressly excludes discretionary expenditures by executive officers from taxpayer challenges.[19]

Sales tax.

A business which has the burden of calculating, collecting, and remitting a sales tax has standing to challenge the constitutionality of a statute authorizing a municipality to levy the sales tax on consumers.[20] Even if a business does not itself collect a sales tax, it has standing to challenge the constitutionality of the tax if it is required to pay the amount of the tax.[21]

CUMULATIVE SUPPLEMENT

Cases:

Link between legislative action and expenditure of public funds was too attenuated to supported taxpayer standing under Article III, in § 1983 action asserting Establishment Clause challenge to spending of public funds to administer recusals pursuant to state legislation allowing state magistrates to recuse themselves from performing marriages on account of religious objections, which expenditures involved transporting a willing magistrate to perform marriages in a county in which no magistrate was willing to perform marriages, and making a one-time payment into state retirement system for each reappointed magistrate who had a gap in service because of magistrate's pre-legislation resignation based on unwillingness to perform marriages; taxpayers could not point to a specific appropriation by state legislature to implement the recusal scheme, and the legislation was not a spending bill and instead was a regulatory measure requiring some level of incidental expenditure. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. Ansley v. Warren, 861 F.3d 512 (4th Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Osediacz v. City of Cranston, 414 F.3d 136 (1st Cir. 2005).

2 N.C.—Saine v. State, 210 N.C. App. 594, 709 S.E.2d 379, 267 Ed. Law Rep. 897 (2011).

3 U.S.—Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 127 S. Ct. 2553, 168 L. Ed. 2d 424, 44 A.L.R. Fed. 2d 637 (2007).

4 U.S.—Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc., 509 F.3d 406 (8th Cir. 2007).

5 U.S.—Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968).
Conn.—United Illuminating Co. v. City of New Haven, 179 Conn. 627, 427 A.2d 830 (1980).
Fla.—Department of Educ. v. Lewis, 416 So. 2d 455, 5 Ed. Law Rep. 681 (Fla. 1982).
La.—Church Point Wholesale Beverage Co., Inc. v. Tarver, 614 So. 2d 697 (La. 1993).
Nev.—Clark County v. City of Las Vegas, 94 Nev. 74, 574 P.2d 1013 (1978).
N.C.—Stanley v. Department of Conservation and Development, 284 N.C. 15, 199 S.E.2d 641 (1973).
N.D.—Herr v. Rudolf, 75 N.D. 91, 25 N.W.2d 916, 169 A.L.R. 1388 (1947).
No taxpayer standing
A father's allegations that he paid taxes to a school district indirectly through child support payments to the child's mother were insufficient to confer taxpayer-standing status to challenge the constitutionality of the school district's policy of requiring the teacher-led recitation of the Pledge of Allegiance.
U.S.—Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301, 159 L. Ed. 2d 98, 188 Ed. Law Rep. 17 (2004) (abrogated on other grounds by, Lexmark Intern., Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)).
A.L.R. Library
Application of Municipal Taxpayer Standing Doctrine, 51 A.L.R.6th 333.
Taxpayer Standing to Challenge Action Taken by Federal Government-Supreme Court Cases, 44 A.L.R. Fed. 2d 213.

6 N.Y.—Boryszewski v. Brydges, 37 N.Y.2d 361, 372 N.Y.S.2d 623, 334 N.E.2d 579 (1975).

7 U.S.—Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968); McCollum v. California Dept. of Corrections and Rehabilitation, 647 F.3d 870 (9th Cir. 2011); Freedom From Religion Foundation, Inc. v. Olson, 566 F. Supp. 2d 980, 51 A.L.R.6th 685 (D.N.D. 2008).

8 U.S.—Freedom From Religion Foundation, Inc. v. Ayers, 748 F. Supp. 2d 982 (W.D. Wis. 2010).

9 U.S.—Freedom From Religion Foundation, Inc. v. Olson, 566 F. Supp. 2d 980, 51 A.L.R.6th 685 (D.N.D. 2008).
Taxing and Spending Clause
A plaintiff will have taxpayer standing to allege the unconstitutionality only of exercises of congressional power under the Taxing and Spending Clause; it will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute.
U.S.—Winkler v. Gates, 481 F.3d 977 (7th Cir. 2007).

10 U.S.—Does 1-7 v. Round Rock Independent School Dist., 540 F. Supp. 2d 735, 231 Ed. Law Rep. 235 (W.D. Tex. 2007).

11 U.S.—Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980).
Ala.—Britnell v. Alabama State Bd. of Ed., 374 So. 2d 282 (Ala. 1979).
Ga.—Smith v. McMichael, 203 Ga. 74, 45 S.E.2d 431 (1947).
Ind.—Graves v. City of Muncie, 255 Ind. 360, 264 N.E.2d 607 (1970).
Ky.—Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459 (Ky. 1998).
La.—Graham v. Jones, 198 La. 507, 3 So. 2d 761 (1941).
Mich.—Hertel v. Racing Com'r, Dept. of Agriculture, 68 Mich. App. 191, 242 N.W.2d 526 (1976).
Neb.—City of Ralston v. Balka, 247 Neb. 773, 530 N.W.2d 594 (1995).

S.C.—Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88, 173 A.L.R. 397 (1947).
S.D.—Stumes v. Bloomberg, 1996 SD 93, 551 N.W.2d 590 (S.D. 1996).
Tenn.—Donathan v. McMinn County, 187 Tenn. 220, 213 S.W.2d 173 (1948).
W. Va.—State ex rel. Goodwin v. Cook, 162 W. Va. 161, 248 S.E.2d 602 (1978).

Nexus requirement

A taxpayer must demonstrate a nexus between challenged spending and the constitutional right in order to establish taxpayer standing.

U.S.—Drake v. Obama, 664 F.3d 774 (9th Cir. 2011).

12 La.—Graham v. Jones, 198 La. 507, 3 So. 2d 761 (1941).

13 Idaho—Williams v. Baldridge, 48 Idaho 618, 284 P. 203 (1930).
La.—Graham v. Jones, 198 La. 507, 3 So. 2d 761 (1941).
Ohio—State ex rel. Struble v. Davis, 135 Ohio St. 593, 14 Ohio Op. 529, 22 N.E.2d 81 (1939).

14 U.S.—Capitol Greyhound Lines v. Brice, 339 U.S. 542, 70 S. Ct. 806, 94 L. Ed. 1053, 17 A.L.R.2d 407 (1950); Washington Water Power Co. v. City of Coeur d'Alene, Idaho, 9 F. Supp. 263 (D. Idaho 1934).
Ind.—Davis Const. Co. v. Board of Com'rs of Boone County, 192 Ind. 144, 132 N.E. 629, 21 A.L.R. 557 (1921).
La.—Graham v. Jones, 198 La. 507, 3 So. 2d 761 (1941).
Neb.—Ruwe v. School Dist. No. 85 of Dodge County, 120 Neb. 668, 234 N.W. 789 (1931).

15 Ky.—Catchen v. City of Park Hills, 356 S.W.3d 131 (Ky. Ct. App. 2011).

16 U.S.—Pelphrey v. Cobb County, Ga., 547 F.3d 1263 (11th Cir. 2008).

17 U.S.—Bats v. Cobb County, GA, 495 F. Supp. 2d 1311 (N.D. Ga. 2007).

18 Mo.—Manzara v. State, 343 S.W.3d 656 (Mo. 2011).

School district programs

Taxpayers had standing to raise an Establishment Clause challenge to school district programs which provided classes to nonpublic school students at public expense in classrooms located in and leased from nonpublic schools.

U.S.—School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 105 S. Ct. 3216, 87 L. Ed. 2d 267, 25 Ed. Law Rep. 1006 (1985) (overruled on other grounds by, Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391, 119 Ed. Law Rep. 29, 37 Fed. R. Serv. 3d 1051 (1997)).

Adolescent Family Life Act

Taxpayers had standing to challenge the Adolescent Family Life Act as violative of Establishment Clause both on its face and as applied.

U.S.—Bowen v. Kendrick, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988).

Chaplaincy of state legislature

A tax-paying member of the state legislature had standing to challenge the constitutionality of the practice of beginning each legislative session with a prayer offered by a chaplain paid out of public funds.

U.S.—Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983).

19 U.S.—Sherman v. Illinois, 682 F.3d 643 (7th Cir. 2012), cert. denied, 133 S. Ct. 985, 184 L. Ed. 2d 762 (2013).

20 Ala.—City of Hoover v. Oliver & Wright Motors, Inc., 730 So. 2d 608 (Ala. 1999).

21 Ark.—Ghegan & Ghegan, Inc. v. Weiss, 338 Ark. 9, 991 S.W.2d 536 (1999).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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§ 172. Taxpayers—Requirement of direct injury

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 683

A taxpayer may not urge the unconstitutionality of a statute or administrative regulation where he or she is not directly, injuriously, or prejudicially affected by its allegedly unconstitutional feature.

A taxpayer may not urge the unconstitutionality of a statute or administrative regulation where he or she is not directly,[1] injuriously, or prejudicially affected by its allegedly unconstitutional feature.[2] To satisfy the injury-in-fact requirement for taxpayer standing, the plaintiff must demonstrate a clear nexus between his or her status as a taxpayer and the challenged government action.[3]

A taxpayer cannot complain of others' grievances to sustain his or her attack on the statute,[4] as by urging that it deprives others of property without just compensation,[5] unless a general exception to the third-party standing rules exists.[6] Furthermore, a taxpayer cannot question the constitutionality of a statute the effect of which is to decrease, rather than increase, his or her tax burdens.[7]

A taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer.[8]

CUMULATIVE SUPPLEMENT

Cases:

A taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer. Teeboom v. City of Nashua, 213 A.3d 877 (N.H. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Doremus v. Board of Ed. of Borough of Hawthorne, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952).
Fla.—State, Dept. of Revenue v. Swinscoe, 376 So. 2d 1 (Fla. 1979).
Ga.—Lott Invest. Corp. v. Gerbing, 242 Ga. 90, 249 S.E.2d 561 (1978).
Md.—Stovall v. Secretary of State, 252 Md. 258, 250 A.2d 107 (1969).
N.Y.—Posner v. Rockefeller, 33 A.D.2d 314, 307 N.Y.S.2d 957 (3d Dep't 1970), order aff'd, 26 N.Y.2d 970, 311 N.Y.S.2d 15, 259 N.E.2d 484 (1970).
N.C.—Wilkes v. North Carolina State Bd. of Alcoholic Control, 44 N.C. App. 495, 261 S.E.2d 205 (1980).
Increase in taxes insufficient
U.S.—Western Min. Council v. Watt, 643 F.2d 618 (9th Cir. 1981).
Abortion funding
State citizens lacked taxpayer standing to bring a free exercise claim challenging expenditures of state funds for abortions for low-income women as they failed to show a direct injury.
U.S.—Tarsney v. O'Keefe, 225 F.3d 929 (8th Cir. 2000).

2 U.S.—Appling County v. Municipal Elec. Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980).
Ark.—Dowell v. School Dist. No. 1, Boone County, 220 Ark. 828, 250 S.W.2d 127 (1952).
Mich.—Jones v. Shirley, 56 Mich. App. 65, 223 N.W.2d 367 (1974).
Mont.—Monarch Min. Co. v. State Highway Commission, 128 Mont. 65, 270 P.2d 738 (1954).
Nev.—McLaughlin v. Housing Authority of City of Las Vegas, 68 Nev. 84, 227 P.2d 206 (1951).
N.C.—Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979).
S.C.—Booth v. Grissom, 265 S.C. 190, 217 S.E.2d 223 (1975).
Wyo.—Powers v. City of Cheyenne, 435 P.2d 448 (Wyo. 1967).
Property tax
An interstate-pipeline company that did not engage in natural gas gathering did not have standing to challenge the constitutionality of a tax scheme that taxed the personal property of interstate-pipeline companies providing natural gas gathering services higher than the personal property of Ohio taxpayers that engaged in natural gas gathering.
Ohio—Columbia Gas Transm. Corp. v. Levin, 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008).
Abortion funding
Allegations that requiring state taxpayers to support abortion, through use of state funds to pay for abortions for low-income women, was noxious to the taxpayers' religious beliefs and sinful according to the taxpayers' religious faiths were insufficient to show the direct injury required for taxpayers to have standing to challenge such use of state funds under the Free Exercise Clause.
U.S.—Tarsney v. O'Keefe, 225 F.3d 929 (8th Cir. 2000).
Right to travel
A taxpayer who was not herself impeded from traveling to or settling in California by the property tax system which she challenged and who did not identify any obstacle preventing others who wished to travel to or

settle in California from asserting claims on their own behalf could not have the tax system subjected to heightened scrutiny on the basis that the system violated the constitutional right to travel.

U.S.—Nordlinger v. Hahn, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

3 Colo.—Hickenlooper v. Freedom from Religion Foundation, Inc., 2014 CO 77, 338 P.3d 1002 (Colo. 2014).

Education funding

Taxpayers' alleged injury, that they were required to pay higher taxes than similarly situated residents of property-rich school districts, was not a direct result of the enforcement of the education funding statute and was not fairly traceable to the actions of the Board of Education, the State Superintendent of Education, and the Governor, and therefore, the taxpayers lacked standing to challenge the constitutionality of an education funding statute; local school districts controlled the amount of local property taxes imposed, and the amount of general state aid received by local school districts was not reduced or adjusted to reflect higher local property taxes imposed by school districts and was based on a per pupil formula.

Ill.—Carr v. Koch, 2012 IL 113414, 367 Ill. Dec. 1, 981 N.E.2d 326, 288 Ed. Law Rep. 820 (Ill. 2012).

Violation of state constitution

When a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision such as the Taxpayer's Bill of Rights (TABOR), such an averment satisfies the two-step standing analysis of a legally protected interest and an injury-in-fact.

Colo.—Barber v. Ritter, 196 P.3d 238 (Colo. 2008).

4 Colo.—Reed v. Dolan, 195 Colo. 193, 577 P.2d 284 (1978).

La.—Ricks v. Department of State Civil Service, 200 La. 341, 8 So. 2d 49 (1942).

S.C.—Sanders v. Greater Greenville Sewer Dist., 211 S.C. 141, 44 S.E.2d 185 (1947).

5 Ark.—Connor v. Blackwood, 176 Ark. 139, 2 S.W.2d 44 (1928).

Idaho—Williams v. Baldridge, 48 Idaho 618, 284 P. 203 (1930).

N.C.—Yarborough v. North Carolina Park Commission, 196 N.C. 284, 145 S.E. 563 (1928).

6 Alaska—Sonneman v. State, 969 P.2d 632 (Alaska 1998), holding that a citizen-taxpayer had standing to challenge the constitutionality of a statutory amendment which ended the practice of rotating the order of candidates' names on election ballots and replaced it with a random determination of the order of candidates' names; citizen-taxpayer was raising constitutional issues of public significance, he had preserved his core constitutional arguments on appeal, the parties were truly adverse, and there was no evidence that anyone who was more directly affected was likely to challenge the amendment.

As to exceptions to the rule regarding standing to assert a third party's constitutional claim, see §§ 166 to 169.

7 U.S.—Citizens' & Southern Nat. Bank v. City of Atlanta, Ga., 53 F.2d 557 (C.C.A. 5th Cir. 1931).

Tenn.—Sherrill v. Thomason, 145 Tenn. 499, 238 S.W. 876 (1922).

8 U.S.—U.S. v. Windsor, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

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§ 173. Aliens

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 686

An alien may challenge the constitutionality of a federal or state statute affecting him or her.

Generally, an alien has the right to attack the constitutionality of either a federal[1] or a state[2] statute affecting him or her.[3] However, he or she may not do so where his or her rights are not affected by the operation of a statute[4] or a particular feature of a statute.[5]

In the absence of an allegation that a named plaintiff is an alien, there is no standing to assert the rights of aliens.[6]

Aliens legally within the United States may challenge the constitutionality of federal and state actions; even aliens who are in the United States illegally may bring constitutional challenges, including the ability to challenge the revocation of a visa.[7] Because of their territorial nature, however, equal protection and due process protections apply only to citizens and resident aliens, and not to nonresident aliens, and therefore, a nonresident alien may not challenge governmental action on those bases.[8]

CUMULATIVE SUPPLEMENT

Cases:

Individual citizens or lawful permanent residents, with relatives applying for immigrant or nonimmigrant visas, sufficiently alleged a concrete and particularized injury that supported the injury-in-fact element for Article III standing, in action for injunctive relief, alleging that Presidential Proclamation indefinitely barring entry by nationals from six predominantly Muslim countries violated the Establishment Clause; plaintiffs alleged the real-world effect that the Proclamation had in keeping them separated from certain relatives who sought to enter the country. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 1; Presidential Proclamation No. 9645, Sept. 24, 2017, 82 Fed. Reg. 45161, 2017 WL 4231190. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. Ju Toy, 198 U.S. 253, 25 S. Ct. 644, 49 L. Ed. 1040 (1905).
Congressional veto of suspension of deportation
U.S.—I.N.S. v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

2 Ind.—Donaldson v. State ex rel. Taylor, 167 Ind. 553, 78 N.E. 182 (1906).
Student financial assistance
U.S.—Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D. N.Y. 1976), judgment aff'd, 432 U.S. 1, 97 S. Ct. 2120, 53 L. Ed. 2d 63 (1977).

3 U.S.—Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), judgment aff'd, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (the fact that a claim asserted by an alien who was challenging the constitutionality of a provision for veto by either house of Congress for a suspension of deportation was common to all citizens interested in the separation of powers did not preclude him from having standing to maintain the challenge as he had the added motive of being injured by the operation of the statute which he was challenging).

4 U.S.—Kulkarni v. Nyquist, 446 F. Supp. 1269 (N.D. N.Y. 1977).
Cal.—Estate of Horman, 5 Cal. 3d 62, 95 Cal. Rptr. 433, 485 P.2d 785 (1971).
Wis.—Vieau v. Common Council of City of Chippewa Falls, 235 Wis. 122, 292 N.W. 297 (1940).

5 U.S.—Dymytryshyn v. Esperdy, 285 F. Supp. 507 (S.D. N.Y. 1968), judgment aff'd, 393 U.S. 77, 89 S. Ct. 239, 21 L. Ed. 2d 63 (1968).
Tenn.—State ex rel. Angle v. City of Knoxville, 180 Tenn. 462, 176 S.W.2d 801 (1944).

6 U.S.—Texas Supporters of Workers World Party Presidential Candidates v. Strake, 511 F. Supp. 149 (S.D. Tex. 1981).

7 U.S.—Ibrahim v. Department of Homeland Sec., 669 F.3d 983 (9th Cir. 2012).

8 Ill.—Jarabe v. Industrial Com'n, 172 Ill. 2d 345, 216 Ill. Dec. 833, 666 N.E.2d 1 (1996).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

3. Standing of Particular Types of Persons

a. In General

§ 174. Parties

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 680

Generally, only a party to a suit may question the constitutionality of a statute involved in the suit.

As a general rule, the question of the constitutionality of a statute involved in the decision of a suit may be raised only by those who are parties to the suit[1] and may not be asserted by a person brought into the suit only as a formal party.[2] However, the validity of a statute may be considered on its being brought to the attention of the court by persons interested in the effect to be given the statute, although not interested in the case before the court, where the jurisdiction of the court depends on the statute's validity.[3]

A party lacks standing to raise a claim regarding his or her adversary's constitutional rights where the adversary has never advanced such a claim.[4]

CUMULATIVE SUPPLEMENT

Cases:

The rule that a party cannot ordinarily rest his claim to relief on the legal rights or interests of third parties can be forfeited or waived. (Per Justice Breyer, joined by three Justices, with Chief Justice Roberts concurring in the judgment.) June Medical Services L. L. C. v. Russo, 140 S. Ct. 2103 (2020).

A party generally must assert its own legal rights and interests, and cannot rest its claim to relief on the legal rights or interests of third parties. Shealey v. Wilkie, 946 F.3d 1294 (Fed. Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Colo.—In re Special Assessments for Paving Dist. No. 3, in City of Golden, 105 Colo. 158, 95 P.2d 806 (1939).
Iowa—State v. Martin, 210 Iowa 207, 230 N.W. 540 (1930).
Mass.—New England Oil Refining Co. v. Canada Mexico Oil Co., 274 Mass. 191, 174 N.E. 330 (1931).
Mo.—State ex rel. Great American Home Sav. Institution v. Lee, 288 Mo. 679, 233 S.W. 20 (1921).
Wash.—Crane Towing, Inc. v. Gorton, 89 Wash. 2d 161, 570 P.2d 428, 97 A.L.R.3d 482 (1977).
Attorney in disciplinary action
An attorney against whom a disciplinary proceeding was brought for allegedly collecting illegal fees in black lung benefit cases had standing to object to the constitutionality of the attorney's fees provisions of the Black Lung Benefits Act as allegedly depriving black lung benefit claimants of the due process right to legal representation.
U.S.—U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990).

2 U.S.—George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 53 S. Ct. 620, 77 L. Ed. 1265 (1933).

3 Mass.—New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 N.E. 410 (1908).
Me.—Look v. State, 267 A.2d 907 (Me. 1970).

4 U.S.—Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 104 S. Ct. 2694, 81 L. Ed. 2d 580 (1984).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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C. Persons Entitled to Raise Constitutional Questions

3. Standing of Particular Types of Persons

a. In General

§ 175. Creditors

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 680

A creditor may not attack as unconstitutional a statute which does not affect his or her rights against the debtor.

A creditor may not attack as unconstitutional a statute which does not in any way affect the creditor's rights against his or her debtor.[1] A creditor may, however, urge the invalidity of an action which does affect his or her rights as a creditor,[2] on the ground that it impairs the validity of his or her obligation[3] or affects the ability of his or her debtor to pay.[4]

Footnotes

1 U.S.—Kuehner v. Irving Trust Co., 299 U.S. 445, 57 S. Ct. 298, 81 L. Ed. 340 (1937).
S.D.—In re Gooder's Estate, 69 S.D. 242, 9 N.W.2d 143 (1943).

2 U.S.—Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va., 300 U.S. 440, 57 S. Ct. 556, 81 L. Ed. 736, 112 A.L.R. 1455 (1937); Vale v. Gary Nat. Bank, 406 F.2d 39 (7th Cir. 1969).

Necessaries doctrine

The common-law necessaries doctrine creates an obligation directly between a husband and a creditor; accordingly, when a creditor seeks payment of necessary expenses from the wife and an equal protection challenge to the necessaries doctrine arises, the creditor is an appropriate party to assert the husband's rights.

Vt.—Medical Center Hosp. of Vermont v. Lorrain, 165 Vt. 12, 675 A.2d 1326 (1996).

Garnishment

A judgment creditor seeking to garnish the wages of a judgment debtor's wife was injured by, and had standing to challenge the constitutionality of, a statute setting forth an execution exemption in favor of married women, by which a married woman's property is exempt from execution against her husband, even though the judgment creditor was not a member of the class unfairly burdened by the statute; application of the statute could apply to prevent the judgment creditor from garnishing the wife's wages in order to collect on the judgment.

Idaho—Credit Bureau of Eastern Idaho, Inc. v. Lecheminant, 149 Idaho 467, 235 P.3d 1188 (2010).

3 La.—State ex rel. Parish of Ouachita Bd. of School Directors v. City of Monroe, 132 La. 82, 60 So. 1025 (1913).

4 Fla.—State ex rel. Mittendorf v. Hoy, 112 Fla. 526, 151 So. 1 (1933).

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b. Governmental Bodies and Officers

§ 176. Federal and state governments

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 688, 689

The federal government may assert the inconsistency with the Federal Constitution of a statute not of its own making, and a state may question the validity of an enactment of its own legislature when it is prejudicially affected by the feature of which it complains.

The federal government, when confronted by a statute not of its own making, may, like any other litigant, assert the statute's inconsistency with the Federal Constitution.[1]

While a state may not question the validity of an enactment of its own legislature when it is not prejudicially affected by the provision complained of,[2] it may do so when it is prejudicially affected.[3] A state may also challenge the constitutionality of a federal[4] or state[5] statute affecting its rights.

A state, as parens patriae, may not assert a violation of a federal constitutional right on behalf of its citizens.[6]

A state has standing to object to a defendant's discriminatory use of peremptory challenges under state and federal equal protection clauses.[7]

Footnotes

1 U.S.—Marquardt Corp. v. Weber County, Utah, 360 F.2d 168 (10th Cir. 1966).

2 Conn.—Carroll v. Socony-Vacuum Oil Co., 136 Conn. 49, 68 A.2d 299 (1949).
Idaho—State ex rel. Nielson v. City of Gooding, 75 Idaho 36, 266 P.2d 655 (1953).
La.—State v. Foy, 401 So. 2d 948 (La. 1981).
Mo.—Missouri Division of Employment Sec. v. Labor and Indus. Relations Commission, 620 S.W.2d 36 (Mo. Ct. App. W.D. 1981).
Private resolve
Where a state had no constitutional rights that would be affected by the operation of a private resolve waiving the State's sovereign immunity in a negligence action by a prisoner, ordinary rules of standing precluded it from challenging the validity of the resolve.
Me.—Brann v. State, 424 A.2d 699 (Me. 1981).

3 Cal.—People v. Building Maintenance Contractors' Ass'n, 41 Cal. 2d 719, 264 P.2d 31 (1953).
State constitutional provision
State legislators were not required to first pass a law purporting to independently increase taxes in order allege an injury-in-fact to confer Article III standing in their action challenging the constitutionality of the Taxpayer's Bill of Rights (TABOR), which was adopted by voter initiative and which amended the Colorado constitution to prohibit the state legislature from increasing taxes or imposing new taxes without voter approval, since passing such a law would have been futile.
U.S.—Kerr v. Hickenlooper, 744 F.3d 1156 (10th Cir. 2014).

4 U.S.—Oklahoma v. U.S. Civil Service Com'n, 330 U.S. 127, 67 S. Ct. 544, 91 L. Ed. 794 (1947).

5 U.S.—Wyoming v. Oklahoma, 502 U.S. 437, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992).
Kan.—State ex rel. State Bd. of Healing Arts v. Beyrle, 269 Kan. 616, 7 P.3d 1194 (2000).

6 U.S.—State of S.C. v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) (abrogated on other grounds by, Shelby County, Ala. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013)).
Equal protection
Va.—Esper Bonding Co. v. Com., 222 Va. 595, 283 S.E.2d 185 (1981).
State as cause of discrimination
U.S.—Arkansas-Best Freight System, Inc. v. Cochran, 546 F. Supp. 904 (M.D. Tenn. 1981).

7 Fla.—State v. Aldret, 606 So. 2d 1156 (Fla. 1992).

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